TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 366.

SAMUEL C. COHEN, AS TRUSTEE IN BANKRUPTCY OF ELIAS W. SAMUELS, BANKRUPT, PETITIONER,

vs.

ELIAS W. SAMUELS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

(25,685)

20792

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 359.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 2, 1917.

a United States Circuit Court of Appeals for the Second Circuit.

In the Matter of ELIAS W. SAMUELS, Bankrupt.

Transcript of Record.

On Petition to Revise Order of the United States District Court for the Southern District of New York.

United States Circuit Court of Appeals, Second Circuit. Filed Jul- 1, 1916. William Parkin, Clerk.

1 *Petition to Revise in Matter of Law.*

United States Circuit Court of Appeals for the Second Circuit.

In Bankruptcy.

No. 21685.

In the Matter of ELIAS W. SAMUELS, Bankrupt.

To the Honorable Justices of the Circuit Court of Appeals, Second Circuit of the United States:

Your petitioner respectfully shows:

That on May 13, 1915, Elias W. Samuels filed a voluntary petition and was adjudicated a bankrupt on said day. Your petitioner was thereafter duly elected trustee in bankruptcy of said bankrupt and duly qualified and is still acting as such trustee.

That said bankrupt at the time of his adjudication in bankruptcy held five life insurance policies written by various life insurance companies.

2 On September 16, 1915, your petitioner duly brought on motions before the referee in bankruptcy herein requiring the bankrupt to turn over and deliver to the trustee herein each of the said policies of life insurance, or in the alternative, to pay the cash surrender value of said policies as of the date of his adjudication in bankruptcy. That hearings were had on said motions and testimony was taken and such proceedings had thereon which resulted in the denial of your petitioner's motions by the said referee and the entering of orders on December 30, 1915, denying each of said motions.

That thereafter, and on January 18, 1916, your petitioner as trustee filed petitions to review the ruling and order of the said referee as to three of the said insurance policies and duly made motions bringing the said matter on for hearing before the United States District Court for the Southern District of New York, on the 14th day of February, 1916.

The three insurance policies which the trustee petitions for a review are as follows:

1. The policy of the bankrupt in the Penn Mutual Life Insurance Company, No. 508109, for the sum of $3,000, payable one-half to the bankrupt's niece, Louise Marie Samuels, and one-half to the bankrupt's sister, Mary Caruthers, as beneficiaries, and which policy has a cash surrender value of about $193.85. This policy provides that the bankrupt reserves the right to change the beneficiary, and has the absolute right to do so without the consent of the beneficiary.

2. The policy in the Mutual Life Insurance Company, No.
3 1607555, for the sum of $3,000, payable to the bankrupt's sister Hattie Browd, as beneficiary, and which has a cash surrender value of $753, subject to the deduction of a loan of $555 and interest. This policy provides that the bankrupt reserves the right to change the beneficiary, and the bankrupt has the absolute right to do so without the consent of the beneficiary.

3. The policy in the Equitable Life Assurance Society, No. 914014, for the sum of $1,000, payable to bankrupt's sister, Hattie Browd, as beneficiary, and which policy has a cash surrender value of $396. This policy provides that the bankrupt reserves the right to change the beneficiary and has the absolute right to do so without the consent of the beneficiary.

On March 7, 1916, an order was duly entered for the District Court of the United States, for the Southern District of New York, Hon. Learned Hand presiding, wherein and whereby the orders of the referee were affirmed.

The said order was erroneous in matter of law, in that under the acts and statutes of the United States and the decisions of the Courts of the United States relating to bankruptcy.

1. Your petitioner was entitled to hold each of the said life insurance policies, unless the bankrupt paid the cash surrender values thereof;

2. That said policies of life insurance are assets belonging to the estate in bankruptcy, and as such, pass to the trustee in bankruptcy, pursuant to Section 70-A of the Bankruptcy Act;

3. That the bankrupt having reserved a general power of attorney to change the beneficiary without the consent of the bene-
4 ficiary of each of said policies, the trustee, had an interest, and the Bankruptcy Court, has the power to compel the bankrupt to assign such interest in said policies to the trustee.

Wherefore, your petitioner feeling aggrieved because of said order, asks that the same may be revised in matter of law by your Honorable Court, as provided in Section 24-B of the Bankruptcy Act, and the rules and practice in such cases made and provided, and that the same may be reversed, and for such other and further relief as may be just and proper.

Dated, New York, March 17, 1916.

SAMUEL C. COHEN, *Petitioner.*

STATE OF NEW YORK,
County of New York, ss:

Samuel C. Cohen, being duly sworn, deposes and says that he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to these matters he believes it to be true.

SAMUEL C. COHEN.

Sworn to before me this 17th day of March, 1916.

JOSEPH W. UMANS,
Notary Public, Bronx Co., No. 3.

Certificate filed in New York County, No. 5.

5 *Order Appealed From.*

At a Stated Term of the District Court of the United States, Held for and in the Southern District of New York, at the Federal Court House, Post Office Building, in the Borough of Manhattan, City of New York, on the 7th Day of March, 1916.

Present: Hon. Learned Hand, District Judge.

United States Circuit Court of Appeals for the Second Circuit.

#21685.

In the Matter of ELIAS W. SAMUELS, Bankrupt.

A petition having been filed herein by Samuel C. Cohen, Trustee in Bankruptcy of Elias W. Samuels, bankrupt herein, on the 18th day of January, 1916, asking for a review of the rulings of the Referee made and entered herein on the 30th day of December, 1915, whereby the Referee denied the applications of the Trustee in Bankruptcy to require the bankrupt in the alternative to turn over
6 and deliver to the Trustee certain policies of insurance issued upon the life of the bankrupt by the Equitable Life Assurance Society of the United States, No. 954014, the Mutual Life Insurance Company of New York, No. 1607555 and The Penn Mutual Life Insurance Company, No. 508109, or that the bankrupt pay to the Trustee the cash surrender value thereof as of the date of the bankruptcy proceedings and retain the policy as provided by the Bankruptcy Act; and due notice of such petition having been given to the bankrupt, and the same having been regularly heard upon oral argument and submission of briefs; Lawrence B. Cohen, Esq., appearing for the Trustee in Bankruptcy, and Samuel Sturtz, Esq., for the bankrupt; and due deliberation having been had,

It is ordered: That the said orders made by the Referee herein and entered on the 30th day of December, 1915, be, and the same hereby are affirmed.

LEARNED HAND,
U. S. D. J.

7 *Notice of Motion Before District Court.*

United States District Court, Southern District of New York.

No. 21685.

In the Matter of ELIAS W. SAMUELS, Bankrupt.

Notice of Motion.

SIR: Please take notice, that upon the petition of the trustee, dated July 30, 1915, for an order compelling the bankrupt to turn over the policy of insurance No. 508109 in the Penn Mutual Life Insurance Company, to the trustee, and the notice of said motion, dated July 30, 1915, and upon the policy of insurance in question, and the minutes on the hearings before the Referee, the Certificate of the Referee and upon the order signed by the said Referee, made and entered on December 30, 1915, an application will be made to review the ruling of the said Referee, at a Stated Term of this Court, to be held at the Post Office Building, in the Borough of Manhattan, City of New York, on the 17th day of January, 1916, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can
8 be heard, and the undersigned will ask for such order and further relief as to this Court seems just and proper in the premises.

Dated, New York, January 8, 1916.

Yours, etc.,

LAWRENCE B. COHEN,
Attorney for Trustee.

Office and Post Office Address, 64 Wall Street, Borough of Manhattan, New York City.

To Samuel Sturtz, Esq., Attorney for Bankrupt, 198 Broadway, New York City.

Stipulation Waiving Printing of Notice of Motion.

It is hereby stipulated and agreed that the printing of the notices of motion, dated January 8, 1916, on the motion before the District Court to review the rulings of the Referee in reference to the policies of insurance on the life of the bankrupt, issued by the Equitable Life

Assurance Society of the United States and the Mutual Life Insurance Company of New York, be dispensed with.

Dated, New York, April 29, 1916.

SAMUEL STURTZ,
Attorney for Bankrupt.
LAWRENCE B. COHEN,
Attorney for Trustee.

9 *Referee's Certificate.*

United States District Court, Southern District of New York.

In the Matter of ELIAS W. SAMUELS, Bankrupt.

To the Honorable the Judges of the United States District Court for the Southern District of New York:

I, Peter B. Olney, the undersigned Referee, pursuant to provisions of General Order XXVII, do hereby certify as follows:

The question here presented is whether the bankrupt should be compelled to surrender to his trustee in bankruptcy herein three certain policies of insurance, or any of them.

The following is a summary of the facts:

The petition in bankruptcy herein was filed May 13, 1915. The bankrupt had five policies of insurance upon his life. The trustee made a motion in the case of each policy that the bankrupt be compelled to surrender them to his trustee. The Referee denied the motion in the case of each policy. In the case of the policies in The Penn Mutual Life Insurance Company, the Mutual Life In-
10 surance Company of New York, and the Equitable Life Assurance Society the trustee has filed petitions for review.

(1) The policy of the bankrupt in the Penn Mutual Life Insurance Company was for $3,000, No. 508109, on the twenty-year payment life plan, at a yearly premium of $120.48, payable quarterly. The policy was originally payable to Jacob W. and Henry Samuels, brothers of Elias W. Samuels. On March 2, 1915, the beneficiary was changed to Louise Marie Samuels, a niece, and Mary Caruthers, a sister, one-half to each. On December 17, 1912, the bankrupt borrowed $310.49 on this policy, which loan is still unpaid and the policy in possession of the company. The Actuary of the Penn Company by letter of the date of August 30, 1915, informed the attorney for the bankrupt that upon the full surrender of the policy and three-quarters of the 1915 surplus the company would cancel the outstanding loan of $310.49 and allow a cash value of $193.85. This policy provides that in case the beneficiaries named both predecease the insured then their share shall revert to the insured's estate, and the insured has the right to change the beneficiaries subject to the claims of the company holding the policy as security for the loan.

(2) The policy of the bankrupt in the Mutual Life Insurance

Company of New York was issued June 24, 1905, No. 1607555, for $3,000, and provided for annual premiums for twenty years. The said policy was originally payable to the executors, administrators or assigns of the bankrupt. On February 6, 1908, the bankrupt changed the beneficiary clause and made his mother, Louise
11 Samuels, the beneficiary. She died in May, 1910, and about that time the bankrupt made the beneficiary his sister, Hattie S. Browd, to whom it still remains payable. The bankrupt borrowed $555 on this policy on December 30, 1912, and the policy is deposited as collateral with the company. The annual premiums on the policy are $108.18. The bankrupt, by the terms of the policy, has the right to change the beneficiary.

The company informed the bankrupt's attorney that the company would pay $753 cash, subject to the deduction of the loan of $555 and interest, provided the policy was legally surrendered on December 24, 1915, the date on which the loan would be payable. In case of payment of the cash value of the policy the consent of both the insured and the beneficiary would be necessary, though the insured might change the beneficiary to himself and then collect the cash value without the consent of the present beneficiary.

(3) The bankrupt's policy in the Equitable Life Assurance Society was dated December 29, 1899, for $1,000, No. 914014. When issued it was payable to his mother, Louise Samuels. On July 6, 1911, the beneficiary was changed to Hattie S. Browd, a sister of the insured. The policy contains the following provision: "This policy is issued with the express understanding that the assured may, providing this policy has not been assigned, change the beneficiary, or beneficiaries, at any time during the continuance of this policy, by filing with the Society a written request, duly acknowledged, accompanied by this policy; such change to take effect upon the endorsement of the same on the policy by the Society." Also this provision: that the policy shall lapse "excepting that upon due
12 surrender of this policy, within six months after said lapse, providing premiums have been duly paid for at least three full years of assurance, the Society will give the assured the choice of either a cash value or non-participating paid-up life policy, at the date of lapse, as fixed in the following Table of Surrender Values."

The premiums were paid on this policy to December 28, 1915. Its cash surrender value at that time in the event of lapse would amount to $396.

The policies of insurance, or photographs of the same, were received in evidence; also certain letters of the insurance companies. Some of these letters were objected to, and though they are clearly incompetent if the objection was pressed, I do not understand that the counsel for the trustee seriously objected to the admission of the letters so far as they are statements of facts. It has been customary in this district to receive the letters of responsible officers of the various insurance companies so far as they state facts. Under this arrangement the various insurance companies are very obliging in giving in this way all the information they have with respect to insurance policies on the lives of bankrupts.

In the case at bar I think the principal fact found from the letters was the surrender value. If this is incorrectly given of course, it can be corrected.

The claim of the counsel for the trustee, as stated at page 25 of the testimony, in regard to the policies, is that in those policies where a power of attorney is reserved in the bankrupt to change the beneficiary, the trustee succeeded to an interest, and that the bankruptcy court had power to compel the bankrupt to assign the interest
13 in the policy to the trustee. I was of the opinion that the case of Burlingham v. Crouse in the United States Supreme Court, 228 U. S., page 459, and the case of re L. Hammel & Co., in the United States Circuit Court of Appeals, in this Circuit, 34 A. B. R., 46, dispose of that contention. As I read the case of Burlingham v. Crouse, it holds in substance that there must be a surrender value in the policy belonging to the bankrupt at the date of the bankruptcy, and I understand the Circuit Court of Appeals in L. Hammel & Co. held there was no power in the courts to compel the bankrupt to exercise his right to change the beneficiary in favor of the trustee.

Five orders were entered, one order in the case of each policy. The testimony, however, with respect to all five policies was taken together, and is herewith filed. The three orders of the Referee bearing date the 30th day of December, 1915, are herewith filed; also the order of the District Court extending the time of the trustee to file petitions to review the orders of the Referee made December 30, 1915; the petitions for review bearing date the 18th day of January, 1916, and the original petitions and answers thereto on the motions before the Referee.

All of which is respectfully submitted.

Dated, New York, February 8, 1916.

PETER B. OLNEY,
Referee.

14 *Notice of Motion.*

United States District Court, Southern District of New York.

In the Matter of ELIAS W. SAMUELS, Bankrupt.

SIR: Please take notice, that upon the annexed petition of Samuel C. Cohen, duly dated and verified the 30th day of July, 1915, a motion will be made by the undersigned, at a Stated Term of this Court, to be held at the office of Hon. Peter B. Olney, the Referee herein, No. 68 William Street, Borough of Manhattan, City of New York, on the 16th day of September, 1915, at 3 o'clock in the afternoon of said day, for an order requiring the bankrupt to turn over and deliver to the trustee herein, policy of insurance No. 508109 in the Penn Mutual Life Insurance Company, upon all the grounds set

forth in the annexed petition, and for such other and further
15 relief in the premises as to this Court may seem just and proper.

Dated New York, July 30, 1915.

LAWRENCE B. COHEN,
Attorney for Trustee.

Office and Post Office Address, 64 Wall Street, Borough of Manhattan, New York City.

To Samuel Sturtz, Esq., Attorney for Bankrupt, 198 Broadway, New York City.

Stipulation Waiving Printing of Notice of Motion.

It is hereby stipulated and agreed that the printing of the notices of motion, dated July 30, 1915, on the motions made before the Referee to require the bankrupt to turn over and deliver to the trustee the policies of insurance issued upon the life of the bankrupt by the Equitable Life Assurance Society of the United States and the Mutual Life Insurance Company of New York, be dispensed with.

Dated, New York, April 29, 1916.

SAMUEL STURTZ,
Attorney for Bankrupt.
LAWRENCE B. COHEN,
Attorney for Trustee.

16 *Petition of Samuel C. Cohen.*

United States District Court for the Southern District of New York.

In the Matter of ELIAS W. SAMUELS, Bankrupt.

Petition.

To the Honorable Judges of the United States District Court for the Southern District of New York:

The petition of Samuel C. Cohen, respectfully shows:

That he has been duly appointed the trustee of the estate of the above named bankrupt, and that he has duly qualified and is now acting as the duly appointed and duly qualified trustee in this matter.

This is an application to compel the bankrupt to turn over to your petitioner as trustee, policy on the life of Elias W. Samuels, No. 508109 in the Penn Mutual Life Insurance Company.

The policy is in the sum of $3,000. It was taken out by Elias

W. Samuels on May 1, 1909. The beneficiaries are Louise Samuels and Hattie Browd. The policy having been taken out May 1, 1909, the policy has been in force six years and the policy
17 provides for cash surrender value at the end of six years.

Your petitioner asks that the bankrupt turn this policy over to the trustee in bankruptcy, or that he pay to the trustee the cash surrender value and retain the policy, as provided by the Bankruptcy Act.

That no previous application has been made for this order.

Dated, New York, July 30th, 1915.

SAMUEL C. COHEN,
Petitioner.

STATE OF NEW YORK,
County of New York, ss:

Samuel C. Cohen, being duly sworn, deposes and says that he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof, that the same is true of his own knowled-e except as to the matters therein stated to be alleged upon information and belief, and that as to those he believes it to be true.

SAMUEL C. COHEN.

Sworn to before me this 30th day of July, 1915.

MAX ROTHENBERG,
Notary Public, Kings County, No. 82.

Certificate Filed in N. Y. County, 81.
Kings County Register, No. 6090.
New York County Register, No. 6202.

18 *Petition of Samuel C. Cohen.*

United States District Court for the Southern District of New York.

In the Matter of ELIAS W. SAMUELS, Bankrupt.

Petition.

To the Honorable Judges of the United States District Court for the Southern District of New York:

The petition of Samuel C. Cohen, respectfully shows:

That he has been duly appointed the trustee of the estate of the above named bankrupt, and that he has duly qualified and is now acting as the duly appointed and duly qualified trustee in this matter.

This is an application to compel the bankrupt to turn over to your petitioner as trustee, policy on the life of Elias W. Samuels, No. 954014 in the Equitable Life Assurance Society.

The policy is in the sum of $1,000. It was taken out by Elias W. Samuels on December 26, 1899. The beneficiary is Hattie Browd. The policy having been taken out December 26, 1899, the policy has been in force sixteen years and the policy provides for cash surrender value of $396 at the end of that period.

19 Your petitioner asks that the bankrupt turn this policy over to the trustee in bankruptcy, or that he pay to the trustee the cash surrender value and retain the policy, as provided by the Bankruptcy Act.

That no previous application has been made for this order.

Dated, New York, July 30th, 1915.

SAMUEL C. COHEN,
Petitioner.

STATE OF NEW YORK,
County of New York, ss:

Samuel C. Cohen, being duly sworn, deposes and says that he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

SAMUEL C. COHEN.

Sworn to before me this 30th day of July, 1915.

MAX ROTHENBERG,
Notary Public, Kings County, No. 82.

Certificate filed in N. Y. County No. 81.
Kings County Register No. 6090.
New York County Register No. 6202.

20 *Petition of Samuel C. Cohen.*

United States District Court for the Southern District of New York.

In the Matter of ELIAS W. SAMUELS, Bankrupt.

Petition.

To the Honorable Judges of the United States District Court for the Southern District of New York:

The petition of Samuel C. Cohen, respectfully shows:

That he has been duly appointed the trustee of the estate of the above named bankrupt, and that he has duly qualified and is now acting as the duly appointed and duly qualified trustee in this matter.

This is an application to compel the bankrupt to turn over to your petitioner as trustee, policy on the life of Elias W. Samuels, No. 1607555 in the Mutual Life Insurance Company.

The policy is in the sum of $3,000. The beneficiary is Hattie Browd.

Your petitioner asks that the bankrupt turn this policy over
21 to the trustee in bankruptcy, or that he pay to the trustee the cash surrender value and retain the policy, as provided by the Bankruptcy Act.

That no previous application has been made for this order.

Dated, New York, July 30th, 1915.

SAMUEL C. COHEN,
Petitioner.

STATE OF NEW YORK,
County of New York, ss:

Samuel C. Cohen, being duly sworn, deposes and says that he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

SAMUEL C. COHEN.

Sworn to before me this 30th day of July, 1915.

MAX ROTHENBERG,
Notary Public, Kings County, No. 82.

Certificate filed in N. Y. County 81.
Kings County Register No. 6090.
New York County Register No. 6202.

22 *Affidavit of Bankrupt.*

United States District Court for the Southern District of New York.

In the Matter of ELIAS W. SAMUELS, Bankrupt.

CITY AND COUNTY OF NEW YORK, *ss:*

Elias W. Samuels, being duly sworn, deposes and says; that he is the bankrupt herein and that he filed a voluntary petition in bankruptcy on May 13th, 1915.

On May 1, 1909, a policy of insurance No. 508109 in the sum of three thousand dollars was issued by the Penn Mutual Life Insurance Company upon my life, upon the twenty-payment life plan at a yearly premium of $120.48, payable quarterly. Said policy was originally payable to Jacob W. Samuels and Henry Samuels, my brothers, in equal shares, but on March 2nd, 1915, upon my application to the company, the beneficiary clause was changed by me so that it is now payable one-half to my niece, Louise Marie Samuels, and the other half is payable to my sister, Mary Caruthers.

Upon this policy a loan was made to me on December 17th, 1912, for $310.49, which loan is still unpaid and policy is held by
23 the Company as security. The premiums on said policy were paid until August 1, 1915. The premium which was due on that date has not been paid, and has been extended by the Company to October 1, 1915.

Upon recent inquiry made to the Company with reference to this policy, the following letter was received:

"H. August 30, 1915.

"Samuel Sturtz, Esq., c/o Mr. Ezra DeForest, New York City.

"DEAR SIR: Your letter of the 25th instant addressed to the Penn Mutual Life Insurance Company, has been referred to this Department, and in reply we would say that policy No. 508109, on the life of Elias W. Samuels, was issued with premium date May 1, 1909, at age 38, on the 20 Payment Life plan for $3,000.00 at a yearly premium of $120.48, payable $30.12 each three months, and our records show that 6¼ years' premiums have been paid on the contract to August 1, 1915, with a collateral loan of $310.49 made December 17, 1912, outstanding as a lien. Upon full surrender at the present time of the above policy and ¾ of the 1915 surplus, we would cancel the outstanding loan of $310.49 and allow a cash value of $193.85. This offer of cash is good for 10 days only. Or the present additional loan value of the policy after the payment in cash of the August, 1915, quarterly premium is $175.00. This policy was written payable to Jacob W. and Henry Samuels, brothers of the insured in equal shares, but under date of March 2,
24 1915, the beneficiary clause was changed by the insured and the policy now stands payable ½ unto Louise Marie Samuels, niece of the insured; ½ unto Mary Caruthers, sister of the insured, should either or both predecease the insured, then her or their share shall revert to the insured's estate, with full power to the insured to change the beneficiary clause, subject to the claims of the Company, holding the policy as security for loan.

"As this insurance appears upon the agency of Mr. Ezra DeForest, we are sending this letter through his office.

"Yours truly,

(Signed) GEORGE R. WHITE,
Asst. Actuary."

ELIAS W. SAMUELS.

Sworn to before me this 23rd day of September, 1915.

ANNA NOESSEL,
Commissioner of Deeds, City of New York.

25 *Affidavit of Bankrupt.*

United States District Court, for the Southern District of New York.

In the Matter of ELIAS W. SAMUELS, Bankrupt.

CITY AND COUNTY OF NEW YORK, *ss:*

Elias W. Samuels, being duly sworn deposes and says that he is the bankrupt herein.

On June 24th, 1905, a policy of insurance numbered 1607555 in the sum of $3,000 was issued upon my life by the Mutual Life Insurance Company of New York, providing for payment of an annual premium for 20 full years. This policy was originally made payable to my Estate, and on February 6, 1908, upon my application, the beneficiary was changed to my mother, Louise Samuels. On May 10th, 1910, my mother having died, the beneficiary in the policy was changed to my sister, Hattie S. Browd, to whom said policy is now payable.

Upon this policy I borrowed from the Company the sum of $555.00 on December 30, 1912. That indebtedness is still owing to the company, and said Company holds the policy as security. Upon recent inquiry made to the Company, the following letter was received.

26 "NEW YORK, Aug. 31, 1915.

"Matter of Policy No. 1607555—Elias W. Samuels.

"Samuel Sturtz, Esq., 198 Broadway, New York, N. Y.

"DEAR SIR: In reply to your favor of the 28th instant we beg to say that the above numbered policy was issued June 24th, 1905, in the amount of $3,000, requiring the payment of an annual premium of $108.18 for twenty full years. The insured's age at the date of issuance of the policy was 34. The policy was originally written in favor of the insured, his executors, administrators or assigns. February 6th, 1908, at the request of the insured, the beneficiary of the policy was changed to his mother, Louise Samuels, if living, if not living to the insured's executors, administrators or assigns, the right to change the beneficiary at any time provided the policy "is not then assigned" being reserved to the insured. May 10th, 1910, at the request of the insured, the beneficiary of the policy was changed to the insured's sister, Hattie S. Browd, if living, if not living to the insured's executors, administrators or assigns, the right to change the beneficiary still being reserved to the insured.

"The Company will pay $753. in cash (subject to deduction of loan of $555. and interest, if any) if the policy be legally surrendered on December 24th, 1915, the date on which the loan is repayable.

Very truly yours,

(Signed) "FREDERICK L. ALLEN,
General Solicitor."

F. F. B. W.

27 Thereafter upon further inquiry another letter was received from the Company, of which the following is a copy.

"NEW YORK, Sept. 1, 1915.

"Subject Policy No. 1507555—Elias W. Samuels.

"Samuel Sturtz, Esq., 198 Broadway, New York City.

"DEAR SIR: We advised you fully under date of August 31st. In case of making payment of the cash value of the policy the consent of both the insured and beneficiary would be necessary. The insured could, of course, change the beneficiary to himself and then collect the cash value without the consent of the present beneficiary.

"Very truly yours,

(Signed) "FREDERICK L. ALLEN,
General Solicitor."

F. F. B. F.

From the above it appears that the Company requires the consent of said beneficiary to a surrender of the policy.

Deponent further says that the last premium of $56.25 upon this policy was due on June 24th, 1915, and was paid by the beneficiary, Hattie S. Browd, with her own funds, and on the same day the loan of $550.00 was due and payable, and the same was extended by the payment of interest amounting to $13.41, which was also paid by the beneficiary, Hattie S. Browd. I did not pay this premium nor the interest on this loan. Premiums are payable semi-annually on June 24 and December 24.

ELIAS W. SAMUELS.

Sworn to before me this 23rd day of September, 1915.

ANNA NOESSEL,
Commissioner of Deeds, City of New York.

28 *Affidavit of Bankrupt.*

United States District Court for the Southern District of New York.

In the Matter of ELIAS W. SAMUELS, Bankrupt.

CITY AND COUNTY OF NEW YORK, *ss:*

Elias W. Samuels being duly sworn deposes and says; that he is the bankrupt herein and that he filed a voluntary petition in bankruptcy on May 13th, 1915.

With reference to the policy of insurance issued on my life by the Equitable Life Assurance Society of the United — and numbered 954,014, deponent states that the policy was issued by the Company on June 29th, 1899, for the sum of one thousand dollars,

payable to his mother, Louise Samuels, subject to deponent's right to change the beneficiary. The character of this policy is a twenty payment of life, providing for annual payments of $33.52.

On May 10th, 1910, deponent's mother having died, he made application to the said Insurance Company to change the beneficiary and same was changed and policy is now payble to deponent's sister, Hattie Samuels Browd. Premium has been paid until December 28th, 1915.

29 In the policy of insurance is the following clause with refence to surrender values.

"V. Surrender Values.

"This policy shall lapse, and, together with all premiums paid thereon, shall forfeit to the Society, on the non-payment of any premium when due; excepting that upon due surrender of this policy, within six months after said lapse, providing premiums have been duly paid for at least three full years of assurance, the Society will give the Assured the choice of either a cash value or non-participating paid-up life policy, at the date of lapse, as fixed in the following Table of Surrender Values, the amount of which shall be based on the number of full years' premiums that have been paid; and if this policy should be continued beyond the period covered by the said Table it will be entitled to a cash value equal to the full reserve upon due surrender of this policy on any anniversary of its register date of issue. In consideration of the premises it is understood and agreed that all right or claim for temporary assurance or any other surrender value than that provided in this contract, is hereby waived and relinquished, whether required by the Statute of any State or not."

Recently upon inquiry made of the said Insurance Company with reference to this policy, depoment's attorney received a letter from said Company in which it set forth that the said policy pro-
30 vides for a cash surrender value only in event of lapse, and refers to the particular terms of the policy itself as to the conditions upon which cash surrender values are allowable under said policy. That the premiums having been paid to December 28th, 1915, in the event of lapse on the latter date, the policy would be entitled in accordance with its terms to a cash surrender value amounting to $396.00. The letter further stated "It is the rule of the Society not to allow cash surrender values prior to lapse, but if such prior payments were to be made we would necessarily require in addition to the insured's release a release from the existing beneficiary."

ELIAS W. SAMUELS.

Sworn to before me this 23rd day of September, 1915.

ANNA NOESSEL,
Commissioner of Deeds, City of New York.

31 *Order Denying Motion and Notice of Entry.*

At a Stated Term of the District Court of the United States, Held in and for the Southern District of New York, at the Office of the Referee, 68 William Street, Borough of Manhattan, City of New York, on the 30th day of December, 1915.

Present: Peter B. Olney, Esq., Referee.

In the Matter of ELIAS W. SAMUELS, Bankrupt.

An application having been made by Samuel C. Cohen, Trustee in bankruptcy of the bankrupt herein, for an order requiring the bankrupt in the alternative to turn over and deliver to the Trustee herein a certain policy of insurance issued by the Penn Mutual Life Insurance Company, upon the life of the bankrupt and numbered 508109, or that the bankrupt pay to the Trustee the cash surrender value thereof as of the date of adjudication of the bankrupt and retain the policy as provided by the bankruptcy act, and said application having come on to be heard before the undersigned.

Now upon reading and filing the notice of motion, dated the 30th day of July, 1915, and the petition of Samuel C. Cohen,
32 Trustee, verified the 30th day of July, 1915, in support of said motion; and the affidavit of Elias W. Samuels verified the 23rd day of September, 1915, and the evidence taken upon the hearing on the 23rd day of December, 1915, in opposition thereto, and after hearing Lawrence B. Cohen, Esq., attorney for the Trustee in support of said motion and Samuel Sturtz, Esq., attorney for the bankrupt in opposition thereto, and due deliberation having been had.

Now on motion of Samuel Sturtz, Esq., attorney for the bankrupt, it is

Ordered that the said motion be and the same hereby is in all respects denied.

PETER B. OLNEY,
Referee in Bankruptcy.

Entry of the foregoing order is hereby consented to.

LAWRENCE B. COHEN,
Attorney for Trustee.

Stipulation Waiving Printing of Orders of Referee.

It is hereby stipulated and agreed, that the printing of the orders dated December 30, 1915, made by the Referee, denying the motions to compel the bankrupt to turn over to the trustee the policies of life insurance issued by the Equitable Life Assurance Society of

the United States and the Mutual Life Insurance Company of New York be dispensed with.

Dated, New York, April 29, 1916.

SAMUEL STURTZ,
Attorney for Bankrupt.
LAWRENCE B. COHEN,
Attorney for Trustee.

33 *Opinion of District Court.*

United States District Court, Southern District of New York.

In re ELIAS W. SAMUELS, Bankrupt.

This is an effort to obtain a ruling different from Re Hammel, 221 Fed. R., 56, a decision in which the order was reversed giving the trustee rights in the policy. If that is to be done, it must be either by the Circuit Court of Appeals which made the ruling or by the Supreme Court. The decision is controlling upon me. The general rule that general beneficial powers of appointment are not property in the hands of the donee of the power does not apparently apply to cases of bankruptcy, certainly not in this Circuit.

Order affirmed.

February 28, 1916. L. H.

34 *The Testimony.*

United States District Court, Southern District of New York.

In Bankruptcy.

In the Matter of ELIAS W. SAMUELS, Bankrupt.

NEW YORK, September 16, 1915—3 o'clock.

Hearing on the five motions to compel the bankrupt to surrender certain insurance policies.

Appearances:

Samuel Sturtz, attorney for bankrupt;
Lawrence B. Cohen, attorney for trustee.

ALBERT KRONMULLER, called by the defendant, being duly sworn, testified as follows:

By the Referee:

Q. You are an official of the Equitable Life Assurance Society?
A. Yes.

Q. You produce in answer to subpœna what?
A. I produce nothing.
Q. I thought you had a policy of insurance?
A. It is not in our possession.
35 Q. Have you a copy of it?
A. No.

Mr. Sturtz: I believe I have the original in my possession.

Q. You don't know what it is, then?
A. No, it is only a policy on the life of Elias W. Samuels.
Q. In what amount?
A. $1,000.
Q. Do you know what its surrender value was in June 1915?
A. No, I do not.

By Mr. Cohen:

Q. Have you information on a policy on the life of Jacob W. Samuels in the Equitable Life?
A. No, I have not.

Adjourned to September 30, 1915, at 2 o'clock.

* * * * * * *

NEW YORK, December 23, 1915—3 o'clock.

Adjourned motion re insurance policies, &c.

Appearances:

Samuel Sturtz, attorney for bankrupt;
M. L. Lesser, attorney for trustee.

ELIAS W. SAMUELS, the bankrupt, called as a witness, having been duly sworn testified as follows:

By Mr. Sturtz:

Q. You are the bankrupt in this proceeding?
A. I am.
Q. And the petition in bankruptcy was filed against you on May 13th, 1915, is that correct?
A. Yes.
36 Q. At the time when you filed your voluntary petition you had certain policies of insurance on your life?
A. I did.
Q. Did you have a policy of the Prudential Insurance Company of America?
A. I did.
Q. I show you this policy and ask you whether that is the policy?
A. That is the policy.

Mr. Sturtz: I offer in evidence policy issued by the Prudential

Insurance Company of America, November 6, 1897, semi-annual premium $10.49, ordinary life, $1,000, numbered 92734. It reads, "Payable to the executors, administrators or assigns of Elias W. Samuels." Attached to the policy is a slip showing the change of beneficiary to Hattie S. Browd, sister of the beneficiary, and which is dated February 24, 1912.

Same received in evidence and marked Bankrupt's Exhibit No. 1 of this date.

Mr. Sturtz: I offer in evidence with reference to this policy a letter written by the supervisor of the insurance company, dated September 2nd, 1915 (reads same to the Referee).

Mr. Lesser: I object to the letter on the ground that it is incompatent, irrelevant and immaterial, and on the further ground that no proper foundation has been laid for its introduction. It contains opinions and matters which are on their face contradictory to the policy.

Objection overruled. Exception.

Received in evidence and marked Bankrupt's Exhibit No. 2 of this date.

37 Q. Did you have a policy in the Penn. Mutual Life Insurance Company?

A. I did.

Q. How much was the policy for?

A. $3,000.

Mr. Sturtz: I haven't the policy here, but I offer in evidence a photographic copy. We will have to get that.

The Referee: Where is that?

Mr. Sturtz: It is with the company on a loan.

Same to be marked Bankrupt's Exhibit No. 3 of this date.

Mr. Sturtz: The policy is dated May 1, 1909, numbered 508,109 for $3,000, issued by the company upon the life of the bankrupt, has a 20 payment life plan, with a yearly premium of $120, payable quarterly.

Q. This policy was originally issued to whom?

A. Jacob W. and Henry Samuels.

By the Referee:

Q. Who are they?

A. My brothers.

By Mr. Sturtz:

Q. On March 2, 1915, was the beneficiary changed?

A. Yes.

Q. To whom?

A. Louise Marie Samuels, a niece, and a sister, Marie Carruthers.

Q. One-half to each?

A. One-half to each.

Q. Did you borrow any money on this?
A. I cannot give the exact date.
Q. December 17, 1912?
A. December 17, 1912.
Q. You borrowed $310.49?
A. I did.
Q. Is that loan still unpaid?
A. It is.
Q. Where is the policy?
A. The company has it.

38 By the Referee:

Q. How did he get it? I thought the policy was on the brothers' lives. Was it assigned to you?
A. No. On my life, with them as beneficiary.
Q. How did you have it changed?
A. To a niece and a sister.

Mr. Sturtz: I offer in evidence letter in this matter from the insurance company dated August 30, 1915 (shows same to Mr. Lesser).

Mr. Lesser: I object to the introduction of that letter on the same grounds.

Objection overruled. Exception.

Same received in evidence and marked Bankrupt's Exhibit No. 4 of this date.

Mr. Sturtz reads the letter to the Referee.

By Mr. Sturtz:

Q. At the time when you filed the petition in bankruptcy did you have a policy in the Mutual Life Insurance Company?
A. I did.
Q. Was that issued to you on June 24, 1905?
A. It was.

Mr. Sturtz: I offer in evidence policy of the Mutual Life Insurance Company, dated June 24, 1905, numbered 1607555, providing for annual premium for 20 full years. I am going to get a photographic copy. The company has it on loan.

Same to be marked Bankrupt's Exhibit No. 5 of this date.

Q. That policy originally was payable to your estate, was it not?
A. It was.

39 Q. On February 6, 1908, you changed the beneficiary to your mother Louise Samuels, did you not?
A. I did.
Q. When did your mother die?
A. In 1908 I think.
Q. May 10, 1908?
A. Around that time.
Q. Then did you change the beneficiary again to your sister Hattie S. Browd?

A. Yes.
Q. Is it now payable to her?
A. It is.
Q. Where is the policy?
A. The company has it for a loan.
Q. Do you know how much the loan is?
A. $555 I think. I am not quite sure.
Q. That was made December 30, 1912?
A. It was.

Mr. Sturtz: I offer in evidence a letter received from the solicitor of that company with reference to this policy.

Mr. Lesser: I object to the admission of the letter.
Objection overruled. Exception.
The same was received in evidence and marked Bankrupt's Exhibit No. 6 of this date.
Mr. Sturtz: I offer in evidence letter from the same company dated September 1, 1915.
Mr. Lesser: I object to this. This is written by a general solicitor.
Objection overruled. Exception.
Same received in evidence and marked Bankrupt's Exhibit No. 7 of this date.

Q. I want to call your attention to this letter where they say here "In case of making payment of the cash value of the policy the consent of both the insured and the beneficiary will be necessary." At the time of the filing of your petition did you have a policy in the Equitable Life Assurance Society?
A I did.
Q. Is this (indicating) your policy?
A. It is.

Mr. Sturtz: I offer it in evidence.
Same received in evidence and marked Bankrupt's Exhibit No. 8 of this date.
Mr. Sturtz: This policy is dated December 29, 1899, issued payable to his mother, Louise Samuels, $1,000. On July 6th, 1911, the beneficiary was changed to Hattie Samuels Browd, the sister of the assured.
Mr. Sturtz: I offer in evidence on this policy a letter from the assistant secretary of the Equitable Life Assurance Society.
Mr. Lesser: I object to the admission of that letter.
Objection overruled. Exception.
Received in evidence and marked Bankrupt's Exhibit No. 9 of this date.

Q. At the time of the filing of your petition did you have a policy in the Metropolitan Life Insurance Company?
A. I did.
Q. Is this (indicating) your policy?
A. It is.

Mr. Sturtz: I offer it in evidence.

The same received in evidence and marked Bankrupt's Exhibit No. 10 of this date.

Q. Your policy is dated June 26th, 1911, for $2,500 and payable to the assured's estate. On September 1, 1911, it was changed and made payable to Mrs. Mary Watson. In 1910 were you a member of the firm of Harry Samuels & Brothers?

A. I was.

41 Q. What kind of busines did they carry on?

A. Jobbing and millinery.

Q. What were the circumstances under which you got out this policy?

Mr. Lesser: That is objected to as incompetent, irrelevant and immaterial.

Objection overruled.

A. I had made a loan from Mary Watson of $1,500, and after having that loan a short while she asked me what was to secure her for the loan. I told her I would take out life insurance. I took this policy and communicated with the agent of the Metropolitan Life Insurance Company and explained the circumstances to him. He told me that we could not take out a policy under the name of Mary A. Watson owing to her not being a blood relation. He therefore informed me that if I took out a policy making same payable to my estate——

Mr. Lesser: He is telling us now about conversations with some officers or somebody of the company. We don't know who it is or when it was.

The Referee: That is going further than I think you can go.

Q. At the time when you took this policy you took it out payable to your own estate?

A. I did.

Q. On September 1, 1911, you changed the beneficiary to Mrs. Mary Watson?

A. I did.

Q. When you changed the beneficiary and the policy was returned to you, what did you do with the policy?

A. Handed it to Mary A. Watson.

Q. Why?

A. In protection of a loan.

42 Q. That she had made to you?

A. That she had made to me.

Q. How much was that loan?

A. $1,500.

Q. Did you deliver this policy to her about September 1, 1911?

A. I did.

Q. That is, after you changed the beneficiary?

A. Yes.

Q. Did it remain in her possession ever since?

A. Up to the time of the bankruptcy.

Q. What happened then?
A. My attorney informed me that it was proper to have that policy put in my schedules.

Mr. Lesser: I object to what his attorney told him, and move to strike it out. His attorney can testify to that.
Objection sustained. Motion granted.

Q. When did you get this policy from her?
A. When making my schedules in bankruptcy.

By Mr. Lesser:

Q. When was this loan made?
A. In the early part of 1910.
Q. And that is before you took out your policy?
A. Yes.
Q. Was there any talk at that time you made the loan of giving the policy for security of that loan?
A. No.
Q. That was not thought of at that time?
A. No.
Q. Did Mrs. Watson ask you for security at the time you made the loan?
A. No.
Q. When was the first time that the question of security arose?
A. June, 1910—1911.
Q. Did she ask you for security?
A. She did.
43 Q. Did you give her any security besides the policy?
A. I did not.
Q. Was this a personal loan of yours?
A. It was.
Q. Or was it a loan of the company?
A. Of the company.
Q. And your brothers then were liable for that loan as well as you?
A. They were.
Q. Is that loan scheduled in the schedules?
A. Of the bankruptcy of the firm, yes; not of mine.
Q. Does it appear in your schedules?
A. It does not.
Q. Have you paid anything on that loan?
A. The firm has.
Q. How much did the firm pay?
A. About $750.
Q. How much is still due?
A. About $750.
Q. When was the last payment made?
A. That was in 1912.
Q. Who pays the premiums on the policy?
A. I do.

Q. Did you pay the last premium?
A. I did.
Q. Did Mrs. Watson pay any of the premiums?
A. She did not.
Q. Why was it that your policy of insurance was given as security instead of your brothers' policy?
A. Because the money was given to me.
Q. You said it was given to the firm?
A. It was given to me to give to the firm. I took it upon myself to be responsible for it.
Q. Is there any evidence of the indebtedness, any written evidence?
A. The books of the firm.
Q. When you got the money from Mrs. Watson, how did you get it, in check or cash?
A. In cash.
Q. Did you give her a receipt for it?
A. I did not.
Q. Did you give her a note for it?
A. I did not.
44 Q. Just your verbal promise to pay?
A. That is all.
Q. Was it the promise of the firm to pay or your promise?
A. My promise.
Q. Why do you say it was a loan of the firm?
A. I gave the money to the firm. The firm needed it and spoke to me about it and I got it. They needed; did not know where I was getting it from at all.
Q. Were any other moneys loaned to you by Mrs. Watson?
A. No.
Q. That $1,500 is the only money which you took from her?
A. That is all.
Q. Why is it that the loan appears in the schedules of the company instead of the schedules of yourself?
A. I have given her that policy to cover that. That is why I don't think I owe it to her.
Q. You said that was just for security?
A. For security. I took out the policy.
Q. You did not pay the loan by taking up the policy?
A. No. That is the policy.
Q. Which is this, a loan of the firm or a loan of yours?
A. It is a loan of the firm.
Q. You are sure about that?
A. Positive.

By Mr. Sturtz:

Q. Harry Samuels & Company, the firm, went into bankruptcy?
A. They did.
Q. And they Scheduled this indebtedness?
A. They did.

Q. And then a corporation was formed afterward?
A. Yes.
Q. And assumed this debt, the corporation?
A. Yes.
45 Q. Does it appear on the books of the corporation?
A. Yes.
Q. The corporation went into bankruptcy?
A. Yes.
Q. Did that loan appear in the schedules of the corporation?
A. Yes.

By Mr. Lesser:

Q. You still consider that policy as yours, don't you?
A. Well, I have given it as good faith for the money that was loaned.
Q. Merely as security, though?
A. Well, I don't know as I would say security. She has got that as security when I first took it out.
Q. But the agreement was that if you pay her the debt, then the policy remains yours?
A. Yes.

The Referee: What was the surrender value of the policy at the date of the indebtedness?
Mr. Sturtz: About $192.
(Discussion off the record.)

MARY A. WATSON, a witness called on behalf of the bankrupt, having been duly sworn, testified as follows:

By the Referee:

Q. Where do you live?
A. 606 West 135th Street.
Q. Are you a married woman?
A. I am a widow.

46 By Mr. Sturtz:

Q. In June, 1910, did you loan money to Mr. Elias W. Samuels, the bankrupt?
A. I did.

Mr. Lesser: That is a conclusion.

By the Referee:

Q. Did you have any business transactions with Mr. Elias W. Samuels?
A. Yes.

By Mr. Sturtz:

Q. Tell us what it was?

A. He came to me and said he required some money, wished to know if I would loan him some. I having about $1,500 not invested told him yes, I could loan him that amount. He accepted it and invested it, so he told me. It went on for some time and I asked him about security and he said he had no security to give, but he would take out a life insurance policy for me, which he did and gave the policy to me.

Q. Do you know when that was?

A. That was in the fall, I think, of 1911. I am not positive, until I look at my memorandum.

Q. Is this the policy, Bankrupt's Exhibit No. 10 of this date (indicating)?

A. Yes, that is it.

Q. Has that policy been in your possession from that time?

A. Yes, it has.

Q. That is until May of this year?

A. About that time, yes.

Q. Has any part of that $1,500 been paid to you?

A. There was $750 paid to me.

Q. Who paid you?

A. Mr. Samuels.

47 Q. Do you know what the money was used for, the $1,500, when you originally gave it?

A. I was told it was invested in Harry Samuels & Brothers.

Q. Who paid you the $750?

A. Harry Samuels & Brothers. Mr. Elias Samuels handed it to me, but it came from the firm.

Q. In May of this year you gave this policy to Mr. Samuels so that he could schedule it in his schedules?

A. I think he said something about bankruptcy at the time.

By Mr. Lesser:

Q. When did you see this policy before today?

A. It was in the spring.

Q. When was the last time you saw it?

A. In the spring of this year.

Q. Where was that?

A. From my safe deposit vault.

Q. How long did you have it in your safe deposit box?

A. That must have been a year or more.

Q. About a year?

A. I think so. More than that.

Q. From when to when?

A. Well, that was in the fall I received it.

Q. Fall of what year?

A. 1911 I think it was.

Q. You had it from then until when?

A. Mr. Samuels went into bankruptcy and then I handed him the policy.

Q. Why did you give it to him?

A. He asked me. He said he required it. I don't know—bankruptcy proceedings or something of the sort, and they would require it.

Q. Did you get a receipt from him when you gave it to him?

A. No.

Q. At the time you loaned him the money did you get
48 any paper in writing showing that such a loan had been made?

A. No, I didn't.

Q. Was this money given to Mr. Samuels personally or was it given to his firm?

A. It was given to him.

Q. Are you related in any way to Mr. Samuels?

A. No.

Q. How long have you known him?

A. I have known him about 6 years before the policy was issued. I know him about 11 or 12 years.

Q. Have you paid any premiums on this policy?

A. No.

Q. To whom did you look for a payment of that loan?

A. Mr. Elias Samuels.

Mr. Lesser: I will submit all the original motion papers in these two matters.

The Referee: Mr. Lesser, in regard to these policies, your claim is that in such of them where a power of attorney is reserved in the bankrupt to change the beneficiary the trustee succeeded to an interest, is that it.

Mr. Lesser: Yes.

The Referee: And that the Bankruptcy Court has power to compel the bankrupt to assign the interest in the policy to the trustee?

Mr. Lesser: Yes.

The Referee: That is the main contention, is it not?

Mr. Lesser: Yes.

The Referee: In regard to that matter, I think that the cases of Burlingham v. Kraus, in the United States Supreme Court, and re L. Hammel & Co. in the United States Circuit Court of Ap-
49 peals dispose of that contention; and if that is the only claim the trustee has here on any of these policies I rule that this claim must be disallowed. You may enter your orders accordingly, Mr. Sturtz.

Mr. Sturtz: There are eleven motions here.

The Referee: Then you will have to enter eleven orders.

Mr. Lesser, to establish your claim to any of these policies you have to establish the power and right of the Court to direct the bankrupt, in view of the fact that he has reserved the right in the policy to change the beneficiary, to assign the policy to the trustee.

Mr. Lesser: This might be reaching the same result, but would

be a little different. I also say that the Court has the power to compel the bankrupt to turn over to the trustee any such policy which is not payable or in which his wife is not the sole beneficiary and where all the other prerequisites appear, such as cash surrender value and the right to change the beneficiary, that in such cases the Court can direct that the bankrupt turn over to the trustee that policy or pay the cash surrender value thereof.

The Referee: That is to say, the wife is protected and other people are not?

Mr. Lesser: Yes.

The Referee: I am very clear on that ground too. I don't think that is so.

Hearing Closed.

50 BANKRUPT'S EXHIBIT No. 3.

No. 508,109.

The Penn Mutual Life Insurance Company,
Philadelphia.

Name of Insured: Elias W. Samuels.

Limited Payment Life Policy.

Annual Dividends.

Amount, $3,000.

Date of Policy, May 1st, 1909.

Yearly Payment, $145.80.

Payable —— Annually.

Due the 1st Day of May.

Date March 6, 1915. Endorsement is hereby made of change of beneficiary dated March 2, 1915, to as follows:—one-half unto Louise Marie Samuels, niece of the insured, and one-half unto Mary Caruthers, sister of the insured should either or both of them predecease the insured, then her or their share shall revert to the insured's executors, administrators or assigns, with full power to the insured to change the beneficiary or surrender this policy to said company at any time, this to be done by instrument in writing, under his hand and seal, to be recorded at the home office of the company.

Subject to the claims of the Penn Mutual Life Insurance Company for indebtedness on account of this policy.

Recorded.

J. BURNETT GIBBS,
Actuary.

J. J. H.

12/12/—295.
Number 508109.
Amount, $3,000.

51 The Penn Mutual Life Insurance Company of Philadelphia.

In Consideration of the Application for this Policy, which is made a part hereof, The Penn Mutual Life Insurance Company insures the life of Elias W. Samuels [the insured], of New York, County of New York, State of New York, in the sum of Three Thousand Dollars, and promises to pay at its Home Office, in the City of Philadelphia, unto Jacob W., and Henry, Samuels, brothers of the insured in equal shares; should either or both of them predecease the insured, then his or their share to revert to the insured's executors, administrators or assigns, the said sum insured, upon receipt of due proof of the death of the insured, during the continuance in force of this Policy, upon the following conditions, namely:

The payment in advance to the Company at its Home Office, of the sum of One Hundred and Fifteen 80/100 Dollars at the date hereof, and of the annual premium of One hundred & Fifteen 80/100 Dollars at or before three o'clock P. M., on the First day of May in every year during the life of the insured, or until Twenty full years' premiums shall have been paid.

The right of revocation is reserved by the insured. When the right has been reserved, the insured shall have full power while this Policy is in force (subject to any previous assignment) to change the present beneficiary or beneficiaries. Such change shall be made in writing and shall be valid only upon its endorsement on this Policy by the Company at the Home Office.

This Policy shall participate annually in surplus earnings in accordance with its provisions.

52 The extended insurance, paid-up insurance, and loan or cash surrender value privileges, benefits, and conditions stated on the second and third pages hereof form a part of this Policy as fully as though recited at length over the signatures hereto affixed.

In witness whereof, The Penn Mutual Life Insurance Company of Philadelphia has caused this Policy to be signed by its President, Secretary, and Actuary, attested by its Registrar, at its Home Office, in Philadelphia, Pennsylvania, the First day of May, 1909.

GEO. K. JOHNSON, *President.*
JOHN HUMPHREYS, *Secretary.*

Attest:

A. G. GREENE, *Registrar.*
J. BURNETT GIBBS, *Actuary.*

Age 38.
Sum Insured $3,000.
Yearly Premium $115.80.
For 20 Years.
Limited Payment Life Policy.
Annual Dividends.
Examined by J. H.
L. L.
A. D.
Policy Form No. 2.
Ed. 3, 1909.

From the Date of Issue This Policy Shall Be Without Any Restrictions as to Travel, Residence and Occupation.

I. Payment of Premiums.—All premiums are due and payable in advance at the Home Office of the Company in the City of Philadelphia, or they may be paid to agents on or before the dates when due in exchange for receipts signed by the President, Vice-President, Secretary, Treasurer, or Actuary and countersigned by agent.
53 Any unpaid portion of the year's premium will be deducted from the sum payable under this Policy.

II. Grace in Payment of Premiums.—After the first, any premium on this Policy will be accepted within thirty-one days from its due date. During said period the Policy shall remain in force, but in the event of death the overdue premium will be deducted.

III. Incontestability.—This Policy and the application therefor, set out herein, constituting the entire contract between the parties, shall be incontestable after one year from its date of issue, except for non-payment of premiums; but in case of suicide, whether sane or insane, within one year from the date of this Policy, the liability of the Company shall be limited to the amount of premium paid hereon.

IV. Statements.—All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties and no such statement shall avoid or be used in defence under the Policy unless it is contained in the written and printed application and a copy of such application is endorsed on the Policy when issued.

V. Age.—Any error in stating the age of the insured will be adjusted by the Company paying such amount as the premium actually paid would have purchased at the table rate at the correct age.

VI. Dividends of Surplus.—This policy shall participate in surplus, and upon payment of the second year's premium and at the end of the second and of each subsequent policy year, while
54 the Policy is in force by payment of premiums and thereafter when full paid, the Company will determine and account for the portion of the divisible surplus accruing thereto. These dividends, at the option of the insured, will be applied in any year to reduce the premium, to increase the amount of insurance, or to accumulate to the credit of the Policy at three per cent compound interest per annum, which accumulation will be payable at the maturity of the Policy, or may be withdrawn at any premium anniversary. If no other option is selected, dividends may be withdrawn in cash.

VII. Loans.—After three full year's premiums have been paid, the Company at any time, while the Policy is in force, will advance on proper assignment of the Policy and on the sole security thereof, at 5 per cent interest per annum, a sum equal to the full reserve at the end of the current Policy year on the Policy and on any dividend additions thereto according to the American Experience Table of Mortality, with interest at 3 per cent per annum. There shall be deducted from such loan value any existing indebtedness on the

Policy and any unpaid balance of the premium for the current Policy year, and interest shall be payable in advance on the loan to the end of the current Policy year. Failure to repay any such loan or advance or to pay interest shall not avoid the Policy unless the total indebtedness thereon shall equal or exceed such loan value at the time of such failure nor until one month after notice shall have been mailed by the Company to the last known address of the insured and of the person to whom the loan was made, and of any assignee known to the Company.

55 VIII. Non-Forfeiture.—If this Policy shall lapse through non-payment of premium after three years' premiums have been paid, the Company will secure to the owner thereof a form of insurance, the net value of which shall be equal to the full reserve on the policy and on any dividend additions thereto at the date of default, according to the American Experience Table of Mortality, with interest at 3 per cent., less any existing indebtedness to the Company on the Policy. At the end of the third and succeeding years the cash value is the full reserve, and the paid-up and extension values of this Policy shall be correspondingly increased for any fractional portion of a year's premium which has been paid. This non-forfeiture value shall be secured to the owner of the Policy through one of the following provisions:

First. The automatic extension of the net amount insured by this Policy for the number of years and days stated below, at the expiration of which time the insurance shall cease; or,

Second. The issue of paid-up participating insurance payable at death for the sum provided for below upon written application therefor by the owner of the Policy and the legal surrender of all claim hereunder to the company at its Home Office within one month after lapse; or,

Third. The payment of the cash surrender value provided for below on surrender of the Policy and all claims hereunder to the Company within one month from the date of lapse.

56 IX. *Table of Extension, Paid-up, and Loan or Cash Values Provided for by this Policy.*

At end of year.	Term of extension for this policy without participation.	These values are for $1,000 insurance for this policy multiply by .... three.... paid-up insurance on surrender.	Loan or cash surrender values.
3rd	7 Years 288 Days	$156	$72.81
4th	10 " 78 "	207	98.66
5th	12 " 135 "	258	125.34
6th	14 " 87 "	309	152.88
7th	15 " 306 "	359	181.29
8th	17 " 73 "	409	210.60
9th	18 " 135 "	459	240.83
10th	19 " 139 "	509	272.01
11th	20 " 99 "	558	304.15
12th	21 " 26 "	607	337.28
13th	21 " 298 "	656	371.42
14th	22 " 201 "	705	406.63
15th	23 " 115 "	754	442.94
16th	24 " 58 "	802	480.43
17th	25 " 56 "	851	519.17
18th	26 " 159 "	900	559.25
19th	28 " 140 "	950	600.77
20th	Policy Full Paid	1,000	643.89
25th	" "		700.83
30th	" "		755.88

Should any indebtedness exist it shall be deducted from the Cash Value of the Policy, and the other Values shall be correspondingly reduced.

57 The cash value of any paid-up or extension granted upon the lapse of this Policy will be the full reserve at the time of surrender, less any indebtedness to the Company under the Policy, and will be paid to the owner or owners thereof, upon request and proper release.

X. Reinstatement.—In the event of default in premium payments, unless the cash value has been duly paid, it is agreed that this Policy may be reinstated at any time upon evidence of insurability satisfactory to the Company and the payment of all overdue premiums and the payment or reinstatement of any other indebtedness to the Com*paid* upon said Policy, with interest at the rate of not exceeding six per cent. per annum.

XI. Death Claim.—When this Policy shall become a claim by the death of the insured, settlement less any indebtedness on the Policy, will be made upon receipt of due proof of death.

XII. *Instalment Tables.*

The amount of this Policy when it becomes a claim may be made payable at the option of the beneficiary, unless otherwise directed by the insured in writing filed with the Company, in such number of instalments, two to thirty, as may be chosen in accordance with Table A of Instalment Values Printed below.

Similarly, the amount of this Policy when it becomes a claim may be made payable in annual instalments for twenty years guaranteed and as much longer thereafter as the beneficiary may live, in accordance with Table B of Instalment Values printed below.

58 These tables are based upon a Policy, the proceeds of which are one thousand dollars, and apply pro rata to this Policy.

Table A.

Number of annual instalments.	Amount of each instalment.	Number of annual instalments.	Amount of each instalment.
2	507.39	16	77.29
3	343.23	17	73.74
4	261.19	18	70.59
5	211.99	19	67.78
6	179.22	20	65.26
7	155.83	21	62.98
8	138.31	22	60.92
9	124.69	23	59.04
10	113.82	24	57.33
11	104.93	25	55.76
12	97.54	26	54.31
13	91.29	27	52.97
14	85.95	28	51.74
15	81.33	29	50.60
		30	49.53

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Table B.

Age of payee when policy becomes payable.	Amount of each instalment guaranteed throughout 20 years and so much longer as the beneficiary may live.	Age of payee when policy becomes payable.	Amount of each instalment guaranteed throughout 20 years and so much longer as the beneficiary may live.	Age of payee when policy becomes payable.	Amount of each instalment guaranteed throughout 20 years and so much longer as the beneficiary —.	Age of payee when policy becomes payable.	Amount of each instalment guaranteed throughout 20 years and so much longer as the beneficiary may live.
and under 10	39.52	25	43.16	40	49.95	55	59.97
11	39.70	26	43.49	41	50.55	56	60.58
12	39.89	27	43.84	42	51.17	57	61.17
13	40.08	28	44.21	43	51.81	58	61.72
14	40.28	29	44.59	44	52.46	59	62.24
15	40.49	30	44.98	45	53.12	60	62.71
16	40.71	31	45.39	46	53.80	61	63.15
17	40.94	32	45.82	47	54.50	62	63.54
18	41.18	33	46.27	48	55.19	63	63.89
19	41.43	34	46.74	49	55.89	64	64.19
20	41.69	35	47.23	50	56.59	65	64.45
21	41.96	36	47.73	51	57.29	66	64.67
22	42.24	37	48.26	52	57.98	67	64.85
23	42.53	38	48.80	53	58.66	68	64.99
24	42.84	39	49.36	54	59.33	69	65.09
						70 and over	65.16

The instalments under Table A, or the instalments-certain under Table B, after the first, will be increased by such surplus annually as may be apportioned by the Company.

The commuted value of any unpaid instalments under Table A or the commuted value of any unpaid instalments-certain under Table B will be calculated by the Company at any time upon the same basis (3% compound interest) as the instalments were granted, and will be paid to the owner or owners of the Policy, upon request and proper release.

XIII. Interest Privilege. The proceeds of this Policy or any designated fraction thereof, may at maturity, be allowed to
60 remain with the Company until the death of the beneficiary, during which period the Company will pay to the beneficiary yearly, three per cent. on the amount so held, the first payment being made one year after the maturity of this Policy and the last payment to be pro-rated to the date of the death of the beneficiary. At the time any such interest becomes payable the beneficiary may withdraw the amount held by the Company, thus terminating this feature.

XIV. Assignment. Any assignment of this Policy shall be furnished to the Company and a duplicate thereof attached hereto. Any claim against the Company arising under any assignment of this

Policy shall be subject to proof of interest. No assignment shall impose any obligation on this Company until it has received the original thereof, nor does the Company guarantee the sufficiency or validity of any assignment.

XV. Premium Loans. After the third year if any premium on this Policy, annual, semi-annual or quarterly, be not paid when due or within the period of grace, the Company will charge against the loan value of this Policy such premium with 5 per cent. interest per annum in advance, provided that such loan value is sufficient. The balance of value, if any, not thus used, shall be applied in accordance with the provisions of Section VIII hereof, and any premium loan so made shall be subject to the terms of Section VII. This action of the Company is contingent upon the request for such premium loan being filed by the owner of the Policy at the Home Office while there is no default in the payment of any premium, and such request is revocable as to any future premium.

XVI. Pursuant to Law, a copy of the application for this Policy is endorsed hereon. No alteration of this Policy or waiver of any of its conditions shall be valid unless made in writing and signed by an officer of the Company.

1. A. Give your name in full and both residence and business address. Give Street, Number, Town, County and State.	A. Elias William Samuels. Residence Address 237 W. 111th St. No. Street. County. Business Address 656 Broadway, New York, State. New York.
B. If a Married Woman, State Maiden and Husband's name.	B. Maiden name.....Husband's name.....
C. How long have you resided at your present address?	C. About 15 mos.
D. What have been your places of residence during the past five years?	D. 1836 3d Ave., New York City.
E. Do you intend to change your residence or travel other than within the limits of Temperate Zone? If so, explain fully.	E. No.
2. A. Present occupation? State kind of business.	A. Wholesale millinery. Previous occupation? Same.
B. Do you intend making any change, temporary, or permanent, in your occupation? If so, explain fully.	B. No.
3. A. Give the name and post-office address of the person for whose benefit the insurance is proposed in the event of your death.	A. Jacob William Samuels and Henry Samuels, if said beneficiary outlives me, otherwise to my estate.
B. State the relationship of the person to you.	B. Brothers.
C. If beneficiary is a Married Woman, state Maiden and Husband's name.	C. Maiden name.....Husband's name.....
D. Do you reserve the right to change the beneficiary in accordance with the policy provision?	D. Yes.

4. Give the place and date of your birth. Born at New York County, County of N. Y., State of N. Y., on the 1st day of Oct. 1871. Age nearest birth-day, 38

5. Are you married, Single, Widower or Widow? Single.

6. A. State as far as you know, the following particulars in regard to your grand-parents, parents, brothers and sisters:

	Age if living.	State of health.	Age at death.	Cause of death.	How long sick?	Health previous.
Father's Father.	.....	.....	75	Old Age	Don't know	
Father's Mother.	.....	.....	don't know	" "	" "	
Mother's Father.	.....	.....	" "	" "	" "	
Mother's Mother.	.....	.....	92	" "	" "	
Father.	.....	.....	64	" "	" "	
Mother.	60	About Good		Pneumonia	8 weeks	Good

60*b*

	Total.	Living.	Ages.	Present and past health.	Dead.	Ages.	Of what disease did they die?	How long sick?
B. How many full brothers have you had?	3	2	35-36	Good	1	12	Scarlet fever	
C. How many full sisters?	1	1	30	"				

7. A. Have you your life insured in this or any other company? If so, give the name of each company omitted. A. Equitable Prudential 1,000 each Mutual Life 3,000.

B. Have you ever applied to any company or agent for insurance, without receiving a policy of the exact kind and amount applied for? B. No, except No.

ELIAS W. SAMUELS.

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C. Are any negotiations for insurance now pending? C. No, except No.
If so, state full particulars.

8. Sum to be insured, $3,000. Kind of policy, 20 Pay. Life. How is surplus to be used? In Reduction of Premiums.
How is the Premium to be paid? Annually.

I hereby declare and agree, That I am temperate in my habits, am now in good health and ordinarily have good health, and that in my statements and answers in this application to the Medical Examiner no information has been withheld touching my past and present state of health and habits of life, and present and prospective occupations, employments and residence, with which the Penn Mutual Life Insurance Company should be made acquainted; and that statements and answers to the printed questions above, together with this declaration, as well as those made to the Company's Medical Examiner, shall constitute the application and be the basis of this contract. It is also understood and agreed on behalf of myself and of any beneficiary under any policy issued by the said Company on my life, that the Company shall incur no liability until this application has been received, approved, the policy issued thereon by the Company and delivered and paid for during my lifetime and good health; and that the policy applied for shall be in the form now in use by the Company.

In Witness Whereof, the applicant has hereunto subscribed — name. Dated at New York the 29th day of April 1909.

Witness Present:
MONTE HUTZLER.

Signature of the person proposed for insurance.
ELIAS WILLIAM SAMUELS.
Sign the Names in full. .....

Questions to be Answered by the Person to be Insured.

Name of Applicant, Elias William Samuels. Examined this 29th day of April 1909 at New York, County of New York, State of New York. Residence, 237 W. 111th Street, New York. What is the date of your birth? October 1st, 1871. Do you contemplate any change of residence or occupation? No.

9. A. Are you now in good health? A. Have you been successfully vaccinated? A. Yes. B. Yes.

*10. A. How long since you were attended by a physician or professionally consulted one? B. For what disease?	*A. Childhood. *B. Not that I remember.
C. Give the name and residence of such physician?	C. None that I remember.
D. Give name and residence of your medical adviser, or family physician, to whom you now refer for a certificate, if deemed necessary.	D. None.
E. Has any medical examiner given an unfavorable opinion of your physical condition, with reference to life insurance?	E. No.
60c	
F. Have you ever been advised by a physician to try a change of climate to benefit your health?	F. No.
11. A. Have you Hernia, or have you ever been ruptured? B. If so, do you now wear a suitable truss? C. Do you agree to wear one while insured in this Company?	A. No. B. ..... C. .....
12. A. Do you now use intoxicating Liquors?	A. Yes.
B. To what extent?	B. Occasional slight use not daily.
C. Have you always been temperate in their use? If not, explain the duration and extent of excess and when last.	C. Yes.
D. Have you ever taken a cure for inebriety?	D. No.
13. A. Have you ever used Opium, Morphia, Chloral or any Narcotic, unless regularly prescribed by a physician? If so, explain fully.	A. No.
14. A. Have you had Insanity, Apoplexy, Palsy, Vertigo, Convulsions, Sunstroke, Congestion, Inflam-ation, or any other disorder of the Brain or Nervous System?	

B. Have you had Asthma, Consumption, Spitting of Blood, Habitual Cough and Expectoration, Palpitation, or any disease of the Throat, Heart or Lungs?

C. Have you had Appendicitis, Cancer, or any Tumor, Chronic Diarrhœa, Ear Discharge, Dropsy, Fistula, Gallstones or Gravel, Renal or Hepatic Colic, Open Sores, Inflammatory Rheumatism, Gout, Syphilis or Stricture, or any disease of the Liver, Kidneys, or Bladder?

D. Have you any defect in Hearing or Eyesight, any Malformation or Varicose Veins?

E. Are you now, or have you recently been associated with a person who had consumption?

15. Have you ever had illness, disease or injury other than as stated by you above? If so, state full particulars.

Give here particulars as to date, duration, severity, etc., of each disease you have had.
*Explain fully 10, A and B.

I hereby agree, That all the foregoing statements and answers, made to the Company's Medical Examiner, are a part of my application for insurance, are declared to be true, and are offered to the Company as a consideration for the Contract.

Witnessed by the Examiner:
H. S. WARNER.

Signature of the person proposed for insurance.
ELIAS WILLIAM SAMUELS.

(Here follow tables, marked pages 60*d* and 60*e*.)

Table of Guarantees.

1. Cash and Loan Values, and Paid-up Insurance.

Table for One Thousand Dollars of Insurance.

NOTE.—The Cash and Loan Values and the amounts of Paid-up Insurance stated below are on the basis of $1,000 of insurance. To ascertain the Cash Surrender Value, the Loan Value, or the Amount of Paid-up Insurance available under this policy take the sum stated in the column for the year for which such value or amount is desired, which is in the line opposite the figures corresponding to the "Age of Issue" of the insured under this policy and multiply such sum by the number of thousands of dollars and fractions thereof insured by this policy.

The "Age at Issue" referred to is stated on the margin of the face of this policy.

Cash value.	Age		3rd	4th	5th	6th	7th	8th	9th	10th	11th	12th	13th	14th	15th	16th	17th	18th	19&20										
	at																			21st	22nd	23rd	24th	25th	26th	27th	28th	29th	30th	Year.
Loan value.	Issue.	3rd	4th	5th	6th	7th	8th	9th	10th	11th	12th	13th	14th	15th	16th	17th	18th	19th	20th											
	21	33	50	73	95	117	140	165	191	215	239	265	292	319	348	378	410	442	477	477	477	481	491	502	511	522	533	544	555	
	22	33	51	74	97	119	144	168	195	219	244	271	298	326	356	386	418	452	487	487	487	491	502	511	522	533	544	555	566	
	23	34	52	76	99	122	147	172	199	224	249	276	304	333	363	394	427	461	497	497	497	502	511	522	533	544	555	566	577	
	24	35	54	78	101	124	150	176	203	228	255	282	310	340	370	402	436	470	507	507	507	511	522	533	544	555	566	577	589	
	25	36	55	79	103	127	153	179	207	233	260	288	316	347	378	410	444	480	517	517	517	522	533	544	555	566	577	589	600	
	26	36	56	81	105	129	156	183	212	238	265	294	323	354	386	419	454	490	528	528	528	533	544	555	566	577	589	600	610	
	27	37	57	83	107	132	159	187	216	243	271	300	330	361	393	427	463	499	538	538	538	544	555	566	577	589	600	610	620	
	28	38	58	84	110	135	163	191	221	248	276	306	336	368	402	436	472	509	549	549	549	566	577	577	589	600	610	620	631	
	29	39	60	86	112	138	166	195	226	254	283	313	344	377	410	446	482	521	561	561	561	566	577	589	600	610	620	631	641	
	30	40	61	88	114	141	170	199	230	259	288	319	351	384	419	455	492	531	572	572	572	577	589	600	610	620	631	641	652	
	31	41	62	90	117	144	174	204	236	265	295	326	358	392	428	464	502	542	584	584	584	589	600	610	620	631	641	652	662	
	32	41	64	92	120	147	177	208	241	270	301	333	366	401	437	474	513	553	596	596	596	600	610	620	631	641	652	662	672	
	33	42	65	94	122	151	181	213	246	276	307	340	374	409	446	484	523	565	608	608	608	610	620	631	641	652	662	672	682	
	34	43	67	96	125	154	185	217	251	282	314	347	382	418	455	494	534	576	620	620	620	620	631	641	652	662	672	682	692	
	35	44	68	98	128	157	189	221	256	288	320	354	389	425	463	503	543	586	631	631	631	631	641	652	662	672	682	692	702	
	36	45	69	100	130	160	193	226	261	293	326	361	396	433	472	512	553	596	642	642	642	642	652	662	672	682	692	702	712	
	37	46	71	103	133	163	197	230	266	299	332	367	403	441	480	521	563	607	653	653	653	653	662	672	682	692	702	712	722	
	38	47	72	105	136	167	201	235	272	305	339	374	411	449	488	530	572	617	664	664	664	664	672	682	692	702	712	722	732	
	39	48	74	107	138	170	205	240	277	310	345	381	418	457	497	539	582	627	675	675	675	675	682	692	702	712	722	732	741	
	40	49	75	109	141	174	209	244	282	316	351	388	425	465	505	547	591	637	686	686	686	686	692	702	712	722	732	741	750	
	41	50	77	111	144	177	213	249	287	322	358	395	438	472	514	556	601	648	697	697	697	697	702	712	722	732	741	750	759	
	42	51	79	114	147	181	217	253	292	327	363	401	439	480	521	565	610	657	707	707	707	707	712	722	732	741	750	759	768	
	43	53	80	116	150	184	221	258	298	333	370	408	447	487	530	573	619	667	718	718	718	718	722	732	741	750	759	768	777	
	44	54	82	118	153	188	225	263	303	339	376	414	454	495	538	582	629	677	729	729	729	729	732	741	750	759	759	768	777	785
	45	55	84	121	156	191	229	268	308	344	382	421	461	502	545	590	637	686	739	739	739	739	741	750	759	768	777	785	793	
	46	56	86	123	159	195	234	272	314	350	388	427	468	510	553	599	646	696	750	750	750	750	750	759	768	777	785	793	801	
	47	57	87	126	162	198	238	277	319	356	394	433	474	517	561	607	655	706	760	760	760	760	760	768	777	785	793	801	809	
	48	58	89	128	165	202	242	281	324	361	400	439	481	523	568	614	663	715	770	770	770	770	770	777	785	793	801	809	816	
	49	60	91	130	168	205	246	286	328	366	405	445	487	530	575	622	671	724	780	780	780	780	780	785	793	801	809	816	823	
	50	61	93	133	171	209	250	290	333	372	411	451	493	537	582	629	679	733	790	790	790	790	790	793	801	809	816	823	829	
	51	62	94	135	174	212	253	294	338	376	416	457	499	542	588	636	687	740	799	799	799	799	799	801	809	816	823	829		
	52	63	96	138	177	216	257	299	343	382	421	462	505	549	595	643	694	749	809	809	809	809	809	816	823	829				
	53	64	98	140	180	219	261	303	347	386	426	467	510	554	601	649	701	757	818	818	818	818	818	823	829					
	54	66	99	142	183	222	265	307	351	391	431	472	515	559	605	65–	707	763	826	826	826	826	826	829						
	55	67	101	145	186	226	269	311	356	395	435	477	519	564	611	660	713	771	835	835	835	835	835							

Paid-up	All	3rd	4th	5th	6th	7th	8th	9th	10th	11th	12th	13th	14th	15th	16th	17th	18th	19th	20th	21st	22nd	23rd	24th	25th	26th	27th	28th	29th	30th	Year.
Insurance.	Ages.	150	200	250	300	350	400	450	500	550	600	650	750	800	850	900	950					FULLY PAID UP.								

II. Extended Insurance.

Term Insurance from Original Due-Date of Unpaid Premium.

NOTE.—To ascertain the period of Term insurance applicable to this policy, take the number of years and months in the column for the year for which such Term Insurance is desired, which is in the line opposite the figures corresponding to the "Age at Issue" of the Insured under this policy.

The "Age at Issue" referred to is stated on the margin of the face of this policy.

Age at issue.	3rd		4th		5th		6th		7th		8th		9th		10th		11th		12th		13th		14th		15th		16th		17th		18th		19th		Ye
	Yrs.	Mos.	Yrs.	Mos.	Yrs.	Mos.	Yrs.	Mos.	Yrs.	Mos.	Yrs.	Mos.	Yrs.	Mos.	Yrs.	Mos.	Yrs.	Mos.	Yrs.	Mos.	Yrs.	Mos.	Yrs.	Mos.	Yrs.	Mos.	Yrs.	Mos.	Yrs.	Mos.	Yrs.	Mos.	Yrs.	Mos.	
21	4	10	6	8	8	7	10	7	12	9	15	1	17	5	19	8	21	9	23	8	25	5	27	0	28	7	30	1	31	5	32	10	34	4	
22	4	11	6	8	8	8	10	8	12	11	15	2	17	5	19	7	21	7	23	5	25	1	26	8	28	1	29	6	30	10	32	2	33	8	
23	4	11	6	9	8	9	10	10	13	0	15	3	17	5	19	5	21	5	23	2	24	9	26	3	27	7	29	0	30	3	31	7	33	0	
24	5	0	6	10	8	10	10	11	13	1	15	4	17	5	19	4	21	2	22	10	24	4	25	9	27	1	29	5	29	8	30	11	32	3	
25	5	1	6	11	8	11	11	0	13	2	15	4	17	4	19	2	21	0	22	6	24	0	25	4	26	7	27	10	29	0	30	3	31	7	
26	5	1	7	0	9	0	11	1	13	3	15	4	17	3	19	0	20	8	22	2	23	7	24	10	26	1	27	3	28	5	29	7	30	11	
27	5	2	7	1	9	1	11	2	13	3	15	3	17	1	18	9	20	5	21	10	23	2	24	5	25	6	26	8	27	10	29	6	30	3	
28	5	3	7	2	9	2	11	3	13	3	15	2	16	11	18	7	20	1	21	6	22	9	23	11	25	0	26	1	27	2	28	4	29	7	
29	5	3	7	2	9	3	11	3	13	2	15	1	16	9	18	3	19	9	21	1	22	3	23	5	24	5	25	6	26	7	27	8	28	11	
30	5	4	7	3	9	4	11	4	13	2	14	11	16	7	18	0	19	5	20	8	21	10	22	10	23	10	24	11	25	11	27	1	28	4	
31	5	5	7	4	9	4	11	3	13	1	14	9	16	4	17	8	19	1	20	3	21	4	22	4	23	4	24	4	25	4	26	5	27	8	
32	5	5	7	5	9	4	11	3	13	0	14	7	16	1	17	5	18	8	19	10	20	10	21	10	22	9	23	9	24	9	25	10	27	1	
33	5	6	7	5	9	5	11	2	12	10	14	4	15	9	17	0	18	3	19	4	20	4	21	3	22	2	23	2	24	2	25	2	26	5	
34	5	6	7	6	9	4	11	1	12	8	14	1	15	6	16	8	17	10	18	11	19	10	20	9	21	8	22	7	23	7	24	7	25	10	
35	5	7	7	6	9	3	10	11	12	6	13	10	15	2	16	4	17	5	18	5	19	4	20	3	21	1	22	0	22	11	24	0	25	3	
36	5	7	7	6	9	2	10	10	12	3	13	7	14	10	15	11	17	0	18	0	18	10	19	8	20	6	21	5	22	4	23	5	24	5	
37	5	7	7	5	9	1	10	8	12	0	13	4	14	6	15	6	16	7	17	6	18	4	19	2	20	0	20	11	21	9	22	8	23	8	
38	5	7	7	4	8	11	10	5	11	9	13	0	14	1	15	2	16	2	17	0	17	10	18	8	19	5	20	4	21	1	21	10	22	8	
39	5	7	7	3	8	10	10	3	11	6	12	8	13	9	14	9	15	9	16	7	17	4	18	1	18	10	19	7	20	4	21	0	21	9	
40	5	6	7	2	8	8	10	0	11	3	12	4	13	5	14	4	15	4	16	1	16	10	17	7	18	2	18	11	19	6	20	1	20	10	
41	5	5	7	0	8	5	9	9	10	11	12	1	13	1	13	11	14	10	15	7	16	4	16	11	17	7	18	2	18	8	19	3	19	11	
42	5	4	6	10	8	3	9	6	10	8	11	9	12	8	13	6	14	5	15	2	15	9	16	4	16	10	17	4	17	10	18	5	19	0	
43	5	3	6	9	8	1	9	3	10	5	11	5	12	4	13	1	13	11	14	7	15	2	15	8	16	1	16	7	17	1	17	7	18	2	
44	5	2	6	7	7	10	9	0	10	1	11	1	11	11	12	8	13	5	14	0	14	6	14	11	15	4	15	10	16	3	16	9	17	4	
45	5	0	6	5	7	8	8	9	9	10	10	9	11	6	12	3	12	11	13	5	13	10	14	3	14	8	15	1	15	6	16	0	16	6	
46	4	11	6	3	7	5	8	6	9	6	10	4	11	1	11	9	12	4	12	10	13	2	13	7	13	11	14	5	14	9	15	2	15	8	
47	4	9	6	1	7	3	8	3	9	2	10	0	10	8	11	2	11	9	12	2	12	7	12	11	13	3	13	8	14	1	14	5	14	11	
48	4	8	5	10	7	0	8	0	8	10	9	7	10	2	10	8	11	2	11	7	11	11	12	3	12	7	13	0	13	4	13	9	14	2	
49	4	6	5	8	6	9	7	8	8	6	9	1	9	8	10	2	10	8	11	0	11	4	11	8	11	11	12	4	12	8	13	0	13	5	
50	4	4	5	6	6	6	7	4	8	1	8	8	9	2	9	8	10	1	10	6	10	9	11	1	11	4	11	8	12	0	12	4	12	9	
51	4	3	5	3	6	3	7	0	7	8	8	3	8	9	9	2	9	7	9	11	10	2	10	5	10	8	11	0	11	4	11	8	12	0	
52	4	1	5	1	5	11	6	8	7	4	7	10	8	3	8	8	9	1	9	4	9	8	9	11	10	1	10	5	10	8	11	0	11	4	
53	3	11	4	10	5	8	6	4	6	11	7	5	7	10	8	2	8	7	8	10	9	1	9	4	9	6	9	10	10	1	10	4	10	8	
54	3	9	4	7	5	4	6	0	6	7	7	0	7	5	7	9	8	1	8	4	8	7	8	9	9	0	9	3	9	6	9	9	10	1	
55	3	6	4	5	5	1	5	8	6	2	6	7	7	0	7	4	7	8	7	10	8	1	8	3	8	5	8	8	8	11	9	2	9	6	

W. J. EASTON.
Secretary.

61 BANKRUPT'S EXHIBIT No. 4.

The Penn Mutual Life Insurance Company.

H. PHILADELPHIA, August 30, 1915.

Samuel Sturtz, Esq., c/o Mr. Ezra De Forest, New York City.

DEAR SIR: Your letter of the 25th instant, addressed to the Penn Mutual Life Insurance Company, has been referred to this Department, and in reply we would say that policy No. 508109, on the life of Elias W. Samuels, was issued with premium date May 1, 1909, at age 38, on the 20-Payment Life plan for $3,000 at a yearly premium of $120.48, payable $30.12 each three months, and our records show that 6¼ years' premiums have been paid on the contract to August 1, 1915, with a collateral loan of $310.49 made December 17, 1912, outstanding as lien. Upon full surrender at the present time of the above policy and three-quarters of the 1915 surplus, we could cancel the outstanding loan of $310.49 and allow a cash value of $193.85. This offer of cash is good for 10 days only. Or the present additional loan value of the policy after the payment in cash of the August, 1915, quarterly premium is $175.00. This policy was written payable to Jacob W., and Henry Samuels, brothers of the insured in equal shares, but under date of March 2, 1915, the beneficiary clause was changed by the insured and the policy now stands payable one-half unto Louise Marie Samuels, niece of the insured; one-half unto Mary Caruthers, sister of the insured, should either or both predecease the insured, then her or their share shall
62 revert to the insured's estate, with full power to the insured to change the beneficiary clause, subject to the claims of the Company, holding the policy as security for loan.

The Penn Mutual Life Insurance Company.

No. 2. PHILADELPHIA, 8/30/15.

Samuel Sturtz, Esq., c/o Mr. E. De Forest, New York City.

As this insurance appears upon the agency of Mr. Ezra De Forest, we are sending this letter through his office.

Yours truly,

GEORGE R. WHITE,
Assistant Actuary.

In the Matter of Elias W. Samuels, Bankrupt, December 23, 1915, Bankrupt's Exhibit No. 4, P. M.

BANKRUPT'S EXHIBIT No. 5.

The Mutual Life Insurance Company of New York,

In consideration of the application for this Policy, which is hereby made a part of this contract, promises to pay at its Head Office in the City of New York, unto Elias W. Samuels of New York in the County of New York, State of New York, his executors, administrators or assigns, Three Thousand Dollars, upon acceptance of satisfactory proofs at its Head Office of the death of the said
63 Elias W. Samuels during the continuance of this Policy, upon the following condition; and subject to the provisions, requirements and benefits stated on the back of this Policy, which are hereby referred to and made part hereof:

The annual premium of One Hundred and Eight Dollars and Eighteen Cents shall be paid in advance on the delivery of this Policy, and thereafter to the Company, at its Head Office in the City of New York, on the Twenty-fourth day of June in every year during the continuance of this contract, or until premiums for twenty full years shall have been duly paid to said Company.

The receipt of the first payment of premium hereon is acknowledged.

In Witness Whereof, the said The Mutual Life Insurance Company of New York has caused this Policy to be signed by its President and Secretary, at its office in the City of New York, the Twenty-fourth day of June A. D. one thousand nine hundred and Five.

RICHARD A. R. W. HURDY,
President.

W. J. EASTON, *Secretary.*

Countersigned:

E. H. SHANNON,
For the Company.

Number 1607555.
Amount $3,000.
Age at Issue 34 years.
Annual Premium for 20 Years, $108.18.

By mutual consent and upon request this Policy No. 1607555 is made to read and shall be payable to the Insured's Mother, Louise Samuels, if living; if not to the Insured's executors, administrators and assigns.

New York, Feb'y 6, 1905.

W. J. EASTON, *S'e't'y.*

64 "Change of Beneficiary.—The insured may, from time to time during the continuance of this policy, change the beneficiary or beneficiaries by written notice accompanied by this policy, to the Company at its Head Office in New York City; and such

change shall take effect upon the endorsement of such change of this policy by the Company provided the policy is not then assigned. This policy will be returned after such endorsement."

W. J. EASTON, *Secretary.*
S. M.

By mutual consent and upon request this Policy No. 1607555 is made to read, and shall be payable to the Insured's Sister Hattie S. Browd if living; if not to the Insured's executors and administrators or assigns.

W. J. EASTON, *Sec'y.*

New York, May 10, 1910.

25 L.
Life—Twenty Payments.
Twenty Year Dist.
Aug., 1904.
401 Broadway.

Loan.

Life Policy.

Twenty Years' Premiums.

No. 1607555.

The Mutual Life Insurance Company of New York.

Insurance on the Life of Elias W. Samuels.

Amount, $3,000.
Date, June 24th, 1905.
Term of Life.
—— Ann'l Prem., for 20 Years, $108.18.
12:30:12 L.

65 *Provisions, Requirements and Benefits.*

Premiums.—Each premium is due and payable at the Head Office of the Company in the City of New York, or, at the option of the insured, at any Agency of the Company, in exchange for the Company's receipt signed by the President or Secretary.

Notice that each and every such payment is due is given and accepted by the delivery and acceptance of this policy, and any further notice which may be required by any statute is thereby expressly waived.

Any part of a year's premium, not due and remaining unpaid at the maturity of this policy, shall be deducted from the amount of the claim hereunder.

Grace in Payment of Premiums.—After this policy has been in

force one year, thirty days of grace will be allowed in payment of premiums, with interest for the time taken at the rate of five per cent. per annum, during which time this policy shall remain in force for the full amount.

Automatic Paid-up Insurance.—After three full years' premiums have been paid, this policy, upon the non-payment of any subsequent premium, will become a non-participating paid-up life insurance policy for the amount provided for in the Table of Guarantees on the opposite page for the end of the last year for which complete annual premiums have been paid; provided there be no unpaid loan hereon.

Extended Insurance.—After three full years' premiums
66 have been paid, upon legal surrender of this policy, provided such surrender be made either (1) within thirty days after the non-payment of any subsequent premium on its original due date, or (2) within twelve months after such due date, accompanied by a satisfactory medical examination, and provided there be no unpaid loan hereon, the Company will issue in exchange therefor a non-participating paid-up term insurance policy for the amount insured hereby, which term insurance shall be payable only if the insured shall die within the number of years and months stated in the Table of Guarantees on the opposite page for the end of the last year for which complete annual premiums have been paid.

Cash Surrender Value.—After three full years' premiums have been paid, upon legal surrender of this policy, provided such surrender be made either (1) within sixty days after the non-payment of any subsequent premium on its original due date, or (2) at any time after twenty full years' premiums have been paid, the Company will pay therefor, within sixty days from the date of such surrender, the amount after twenty full years' premiums have been paid, the Company will pay therefor, within sixty days from the date of such surrender, the amount provided for in the Table of Guarantees on the opposite page for the end of the last completed policy year; deducting any unpaid loan hereon.

Loans.—After this policy shall have been in force three full years, the Company, within sixty days after written application and upon a legal assignment of this policy as security, will, in conformity with its rules then in force, loan amounts as provided for in the Table
of Guarantees on the opposite page for the end of the last
67 expired policy year, with interest in advance at the rate of five per cent. per annum, provided (1) that the total sum loaned shall not exceed the amount set opposite the expired year; (2) that premiums be fully paid to the end of the policy year in which the loan falls due; (3) that in any settlement of this policy all outstanding indebtedness shall be paid.

Surplus.—The first distributive share of surplus shall be apportioned to this policy if in force at the expiration of twenty years from date hereof, provided all premiums shall have been duly paid and the insured be then living. At the end of each year ther-after during the continuance of this policy, provided all premiums shall have been duly paid, a further distributive share of surplus shall be apportioned

in the form of additional paid-up life insurance for the amount purchasable by such cash surplus. Any surplus apportioned annually after all the premiums herein stipulated shall have been paid can be drawn in cash at the time apportionment by surrender of a corresponding amount of the additional insurance.

Options.—At the end of twenty years the surplus apportioned may be:

First. Drawn in cash, this policy continuing as a paid-up participating policy for the full amount; or,

Second. Applied to purchase an annuity; or

Third. Applied, after satisfactory medical examination, to purchase additional paid-up insurance. If two years' previous notice of the selection of this option shall have been given to the Company, the surplus shall be so applied without such examination. Or,

Fourth. Added to the Cash Surrender Value of the policy and the total sum be drawn in cash; or,

68 Fifth. Applied, together with the Cash Surrender Value of the policy, to purchase an annuity on the life of the insured, or on the life of any other person nominated by the legal holder hereof.

Residence and Travel.—This policy is free from any restriction as to residence and travel.

Occupation.—This policy is free from any restriction as to military or naval service, and, as to other occupations of the insured, it is free from any restriction after two years from date of issue.

Admission of Age.—The Company will admit the age of the insured upon satisfactory proof: failing such proof, if the age shall have been incontestable if the premiums have been duly paid.

Incontestability.—After two years from date of issue, this policy shall be incontestable if the premiums have been duly paid.

Notice.—No person, except an Executive Officer of the Company or its Secretary at its Head Office in New York, has power on behalf of the Company to make, modify or alter this contract, to extend the time for paying a premium, to bind the Company by making any promise or by accepting any representation or information not contained in the application for this contract. Any interlineations, additions or erasures must be attested by the signature of one of the above named officers. Proofs of death will be required on the forms prescribed by the Company which will be furnished on request.

Assignments.—The Company declines to notice any assignment of this policy until the original assignment, or a duplicate or certified copy thereof, shall be filed in the Company's Head Office. The Company does not assume any responsibility for the validity of an assignment.

W. J. EASTON, *Secretary.*

69 BANKRUPT'S EXHIBIT NO. 6.

The Mutual Life Insurance Company of New York.

Law Department, 55 Cedar Street.

NEW YORK, August 31, 1915.

Frederick L. Allen, General Solicitor.
Murray Downs, Ass't Gen'l Solicitor.
Subject Matter: Policy No. 1607555—Elias W. Samuels.

In the Matter of ELIAS W. SAMUELS, Bankrupt. December 23, 1915.
Bankrupt's Exhibit No. 6. P. M.

Samuel Sturtz, Esq., 198 Broadway, New York, N. Y.

DEAR SIR: In reply to your favor of the 28th instant, we beg to say that the above numbered policy was issued June 24, 1905, in the amount of $3,000, requiring the payment of an annual premium of $108.18 for twenty full years. The insured's age at the date of issuance of the policy was 34. The policy was originally written in favor of the insured, his executors, administrators or assigns. February 6, 1908, at the request of the insured, the beneficiary of the policy was changed to his mother, Louise Samuels, if living, if not living to the insured's executors, administrators or assigns, the right to change the beneficiary at any time provided the policy "is not then assigned" being reserved to the insured. May 10, 1910, at the request of the insured, the beneficiary of the policy was changed to the insured's sister, Hattie S. Browd, if living, if not living to the in-
70 sured's executors, administrators or assigns, the right to change the beneficiary still being reserved to the insured.

The Company will pay $753 in cash (subject to deduction of loan of $555 and interest, if any) if the policy be legally surrendered on December 24, 1915, the date on which the loan is repayable.

Very truly yours,

FREDERICK L. ALLEN,
General Solicitor.

F. F. B. W.

BANKRUPT'S EXHIBIT No. 7.

The Mutual Life Insurance Company of New York.

Law Department, 55 Cedar Street.

Frederick L. Allen, General Solicitor.
Murray Downs, Ass't Gen'l Solicitor.

NEW YORK, Sept. 1, 1915.

Matter Subject: Policy No. 1607555. Elias W. Samuels.

Samuel Sturtz, Esq., 198 Broadway, New York City.

DEAR SIR: We advised you fully under date of August 31st. In case of making payment of the cash value of the policy the consent of both the insured and beneficiary would be necessary. The
71 insured could, of course, change the beneficiary to himself and then collect the cash value without the consent of the present beneficiary.

Very truly yours,

FREDERICK L. ALLEN,
General Solicitor.

F. F. B. F.

In the Matter of ELIAS W. SAMUELS, Bankrupt.

Dec. 23, 1915.
B'kr'pt's Exhibit No. 7 P. M.

BANKRUPT'S EXHIBIT No. 8.

The Equitable Life Assurance Society of the United States.

Henry Baldwin Hyde, Founder, July 26, 1859.

Premium	Amount
$33.52.	$1,000.
Age 28.	No. 954,014.

The Equitable Life Assurance Society of the United States hereby assures the life of Elias W. Samuels of New York, N. Y., hereinafter known as the Assured, and on receipt of satisfactory proofs of the death of the said Assured, providing this policy is then in force, agrees to pay one thousand dollars at its office in the City of New York, to his mother Louise Samuels if living, if not then to the Assured's executors, administrators or assigns, subject to the right of the Assured to change the beneficiary.

72 This assurance is granted in consideration of the written and printed application for this policy, which is hereby made a part of this contract; and of the payment in advance of Thirty-three 52/100 Dollars, and of the payment of a like sum on or before the twenty-eighth day of December in every year thereafter, until premiums for twenty years have been duly paid, or until the prior death of the Assured.

The Loans, Surrender Values, Dividend Guarantee, Options, Privileges and Conditions

Stated on the Second and Third pages hereof, form a part of this contract as fully as if recited at length over the signatures hereto affixed.

New York, December 29, 1899.

R. G. HANN,
Assistant Actuary.

A. W. RIPLEY,
Treasurer.

Examined by
St.

G. C. V. Policy.—24.—20 A. P.—20 P.—'99-11.

Age 28—$1,000.

Second Page.

Privileges and Conditions.

I. Incontestability.

This policy shall be indisputable, after one year from its date of issue, for the amount due, providing the premiums are duly paid.

II. Freedom of Travel and Occupation.

After one year from the date of issue of the policy, there are no restrictions upon travel, residence or occupation, except that
73 military or naval service in time of war is forbidden unless a written permit has been previously obtained and the extra premium fixed by the Society corresponding to the greater risk has previously been paid. In case of death from service in war without such permit the reserve of the policy only will be due. For one year after the date of issue of the policy, travel and residence in Mexico and the Torrid Zone, and engagement in any of the following occupations or employments—military or naval service in time of war, blasting, mining, submarine labor, aeronautic ascensions, the manufacture, handling or transportation of inflammable or explosive substances, service upon railroad trains, or in switching or in coupling

cars, or on any steamboat, or other vessel or boat—will render the policy void; self-destruction, sane or insane, within one year from date of the issuance of the policy, is a risk not assumed by the Society in this contract.

III. Facility in Making Payments.

All premiums are due in the City of New York, but at the pleasure of the Society, suitable persons may be authorized to receive such premiums at other places, on or before the due dates, but only on the production of the Society's receipt therefor, signed by its Secretary, and countersigned by the authorized person to whom the payment is made. Although the contract is based on the receipt of premiums annually in advance, the premium may be made payable in semi-annual or quarterly instalments in advance, but in such case any future instalments which at the maturity of the contract are necessary to complete the full year's premium, shall be deducted from the amount of the claim.

74 IV. Grace in the Payment of Premiums.

Should default be made at any time hereafter in the payment of any premium due upon this policy as herein provided, the Society will waive such default and accept the payment of said premium, provided the amount thereof, with interest thereon at five per centum per annum from the date of *fe*ault be tendered to it within thirty days after such default.

V. Surrender Values.

This policy shall lapse, and, together with all premiums paid thereon, shall forfeit to the Society, on the non-payment of any premium when due; excepting that upon due surrender of this policy, within six months after said lapse, providing premiums have been duly paid for at least three full years of assurance, the Society will give the Assured the choice of either a cash value or non-participating paid-up life policy, at the date of lapse, as fixed in the following Table of Surrender Values, the amount of which shall be based on the number of full years' premiums that have been paid; and if this policy should be continued beyond the period covered by the said Table it will be entitled to a cash value equal to the full reserve upon due surrender of this policy on any anniversary of its register date of issue. In consideration of the premises it is understood and agreed that all right or claim for temporary assurance or any other surrender value than that provided in this contract, is hereby waived and relinquished, whether required by the statute of any State or not.

75 VI. Loans.

After this policy shall have been in force three years the Society will thereupon, or upon any subsequent anniversary of the assur-

ance, loan hereon, under the terms of the Society's loan agreement then in use, a sum or sums the total of which shall not exceed the loan value of the policy as specified in the Table on page 3 hereof, upon condition that at the time of making such loan the policy shall be duly assigned to the Society as collateral security for such loan; and that five per cent. interest on said loan and the full premium for one year shall be paid in advance.

VII. Admission of Age.

The age of the Assured will be admitted during lifetime by the Society on due proof, but if not so admitted proofs of age must be submitted with proofs of death, and the amount of assurance due under the policy at its maturity shall in no case be more than the premium charged would have purchased at the Society's rates in use at the register date of the policy for the Assured's true age.

VIII. Policy and Application the Entire Contract.

This policy and the application therefor, taken together, constitute the entire contract, which cannot be varied except in writing by one of the following Executive Officers of the Society, at its Home Office in New York, viz.:—the President, one of the Vice-Presidents, the Secretary, the Assistant Secretary, one of the Actuaries, the Comptroller, the Treasurer, the Auditor or the Registrar.

76 IX. Privilege of Changing Beneficiary.

This policy is issued with the express understanding that the Assured may, providing this policy has not been assigned, change the beneficiary, or beneficiaries, at any time during the continuance of this policy, by filing with the Society a written request, duly acknowledged, accompanied by this policy; such change to take effect upon the endorsement of the same on the policy by the Society.

Third Page.

Table of Loans and of Surrender Values.

Either in Cash or Paid-up Assurance.

At end of	*Loan at 5% interest.	Cash value.	Paid-up life policy.
3d Year	$56	$40	$150
4th "	$81	$56	$200
5th "	$99	$81	$250
6th "	$118	$99	$300
7th "	$137	$118	$350
8th "	$157	$137	$400
9th "	$200	$157	$450
10th "	$224	$200	$500
11th "	$248	$224	$550
12th "	$274	$248	$600
13th "	$301	$274	$650
14th "	$365	$301	$700
15th "	$396	$365	$750
16th "	$429	$396	$800
17th "	$463	$429	$850
18th "	$498	$463	$900
19th "	$534	$498	$950
20th "	$544	$534	$1,000

77 *Loan granted subject to terms of paragraph VI. of Privileges and Conditions.—Page 2.

Dividend.

If the Assured be living, and this policy is in force on the Twenty-eighth day of December Nineteen hundred and nineteen the Society will pay to the Assured, or assigns, a Cash Dividend, consisting of the policy's full share of Surplus Profits, as determined by the Actuaries of the Society, and this policy may then be continued or surrendered by said Assured, or assigns, under one of the following

Options.

(1.) Draw entire cash value (consisting of guaranteed cash value as fixed in the above table together with the dividend); or,

(2.) Convert entire cash value (consisting of guaranteed cash value as fixed in the above table and the dividend) into a paid-up life policy,

(Subject to a medical examination and the Society's approval of the risk for any excess in paid-up assurance over the amount of the original policy; or,

(3.) Draw dividend in cash, and continue policy as a paid-up life policy for its full amount; or,

(4.) Draw dividend in cash, and surrender this policy for a paid-up life policy, for the amount of guaranteed cash value fixed in the above table, together with an annuity payable during the lifetime of the Assured; or,

(5.) Convert dividend into a life annuity and continue policy for its full amount as a paid-up life policy; or,

(6.) Convert entire cash value (consisting of guaranteed cash value as fixed in the above table and the dividend into a life annuity.

A. W. RIPLEY,
Treasurer.

78 This policy is not valid unless revenue stamps to the amount of $80 are duly affixed and cancelled.

The Society furnishes and attaches at its expense, such stamps, and the assured must see that they are affixed and cancelled at the time of delivery of policy.

(Stamp.)

The Equitable Life Assurance Society of the United States.

120 Broadway.

New York.

Guaranteed

Cash-Value Policy

Limited Payment Life.

20-Year Period.

No. 954,014.

E. W. Samuels.

Amount $1,000.

Age 28 1st Pay't $33.52.
A. Premium $33.52.

Due Dec. 28.

Register date of Policy:

Dec. 28, 1899.

In compliance with the written request of the Assured, duly acknowledged, it is hereby declared that the amount due at the death

of the Assured shall be payable not to the beneficiary hereinbefore designated but to the Assured's sister Hattie Samuels Browd, if living, if not, then to other conditions and requirements remaining unchanged.

New York, July 6th, 1911.

W. B. BRENNAN,
Assistant Treasurer.

In the Matter of Elias W. Samuels, Bankrupt, Dec. 23, 1915.

Bkpt.'s Exhibit No. 8.

F. W.

79 BANKRUPT'S EXHIBIT No. 9.

The Equitable Life Assurance Society of the United States,

120 Broadway, New York.

September 2, 1915.

S. S. McCurdy, Assistant Secretary.

Samuel Sturtz, Esq., 198 Broadway, New York, N. Y.

DEAR SIR: In re Policies Nos. 1022052, 1173065, Jacob W. Samuel; 954014, Elias W. Samuels.

Your three letters of August 30th relating to the above numbered policies have been received, and we reply as follows:

Policy No. 1022052; this policy provides for cash surrender values only in event of lapse. We refer you to the particular terms of the policy itself as to the conditions upon which cash surrender values are allowable under the said policy. According to our records in May, 1915, the date stated by you, premiums were paid continuing the policy in force to January 16, 1916. In the event of lapse on the latter date this policy would be entitled in accordance with its terms to a cash surrender value amounting to $365. It is the rule of the Society not to allow cash surrender values prior to lapse, but if such prior payment were to be made we would necessarily require in addition to the insured's release a release from the existing beneficiary.

The foregoing facts apply also to policy No. 1173065, with the exception that in that case premiums appear to be paid to No-
80 vember 28, 1915, in event of lapse on which date the policy would be entitled to a cash surrender value of $634.

The above explanations also cover policy No. 954014, excepting that in this case premiums appear to be paid to December 28, 1915,

on which date in event of lapse the cash surrender value would amount to $396.

Yours very truly,

S. S. McCURDY,
Assistant Secretary,
By W. B. S.

In the Matter of Elias W. Samuels, Bankrupt, December 23, 1915, Bankrupt's Exhibit No. 9. P. M.

81 *Stipulation.*

United States District Court for the Southern District of New York.

In the Matter of ELIAS W. SAMUELS, Bankrupt.

It is hereby stipulated and agreed that the foregoing constitutes a true and correct record of the District Court in the above entitled matter.

Dated, New York, April 29th, 1916.

SAMUEL STURTZ,
Attorney for Bankrupt.
LAWRENCE B. COHEN,
Attorney for Trustee.

82 *Certificate of Clerk.*

United States District Court for the Southern District of New York.

In the Matter of ELIAS W. SAMUELS, Bankrupt.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 29th day of April, in the year of our Lord one thousand nine hundred and sixteen, and of the Independence of the said United States the one hundred and fortieth.

ALEXANDER J. GILCHRIST, *Clerk.*

83 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of ELIAS W. SAMUELS, Bankrupt; SAMUEL C. COHEN, as Trustee, etc., Petitioner.

Before Coxe, Ward, and Hough, Circuit Judges.

Samuel Sturtz, Esq., for the Bankrupt.
Lawrence B. Cohen, Esq., for the Petitioner.

WARD, *Circuit Judge:*

This is a petition to revise three orders of the District Court refusing the petition of the Trustee that the bankrupt be compelled either to pay him the cash values of certain policies of life insurance or to surrender the policies to him.

They were as follows:

One dated May 1, 1909, in the Penn Mutual Insurance Company for $3,000 payable one-half to the bankrupt's sister and one-half to his niece and in case they or either of them predecease him, their shares or her shares to be payable to his executors, administrators or assigns, he reserving full power to change the beneficiary at any time. After payment of three years premiums, the company
84 agrees to loan on its policies a sum equal to the full reserve to the end of the current policy year or to pay the same sum as its surrender value upon surrender of the policy.

December 17, 1912, the company made a loan on the policy to the bankrupt of $310.49 and is ready on surrender of the policy to cancel the loan and pay $193.85 in cash.

Another policy was in the Mutual Life Insurance Company of New York, dated June 24, 1905, for $3,000, payable originally to the bankrupt's estate and afterwards changed so as to be payable to his sister as the beneficiary. December 30, 1912, the bankrupt borrowed $555 of the company on the policy. The Company is willing upon the consent of both the insured and the beneficiary to pay its cash value, $753, subject to payment of the loan, or in case the beneficiary do not consent, the insured may change the beneficiary to himself and collect the cash value. In this company the surrender value and the loan value are the same.

Another policy is in the Equitable Life Assurance Society for $1,000, dated December 28, 1899, payable to the bankrupt's sister, he reserving power to change the beneficiary. In case of lapse, after the payment of three years' premiums, the company agrees to pay on its policies a cash surrender value, which amounted in this case on December 28, 1915, to $396, or, if there be no lapse, to loan $429 on the policy.

The District Judge relied upon the decision of the Supreme
85 Court in Burlingham v. Crouse, 228 U. S. 459, and our decision In re L. Hammel & Co., 221 Fed. Rep. 56.

Sec. 70 (*a*) of the Bankruptcy Act reads:

"Sec. 70. Title to Property. *a*. The Trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: Provided, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustees as assets; * * *"

The argument for the Trustee would be quite convincing, viz., that the policies passed to the Trustee as property which prior to the filing of the petition the bankrupt could have transferred or which could have been levied upon and sold as his but for the special proviso as to the policies of insurance. The question is one of the construction of this proviso in the statute.

The Supreme Court in Burlingham v. Crouse pointed out that it had been construed by the courts in two different ways, viz.,

First, that all policies on the life of a bankrupt payable to him or his estate were to be treated as being property which the bankrupt could have transferred or which could have been levied on and sold as his, except that the bankrupt might retain those having a
86 surrender value on paying this value to the Trustee. The theory of this construction as thwat Congress enacted the proviso as an exception out of special tenderness to the bankrupt. We took this view in re Coleman, 136 Fed. Rep. 818; Matter of White, 174 Fed. Rep. 333; Matter of Hettling, 175 Fed. Rep. 65.

Second, that no policies payable to the bankrupt or his estate passed to the Trustee except such as have a surrender value and they only to the extent of the surrender value, if the bankrupt or his representatives or his assigns pay that amount to the Trustee within the time prescribed.

Subsequently, in Burlingham v. Crouse, 181 Fed. Rep. 479 and in Everett v. Judson, 192 Fed. Rep. 834, we took the latter view. The Supreme Court affirmed these decisions, 228 U. S. 459 and 474, proceeding upon the theory that in enacting the proviso Congress had in mind not simply the bankrupt but the nature of life insurance. It was thought Congress considered it questionable whether trustees ought to continue payment of premiums on policies which might run for years and so engage in a kind of speculation, delaying the winding up of estates, contrary to one of the fundamental objects of the Bankruptcy Act. On the other hand, if the Trustee did not have the funds to pay premiums, the bankrupt might lose his insurance.

The proviso was regarded not as an exception in favor of the bankrupt but as additional legislation, not limited to the bankrupt but extending to his assigns. The creditors were thought to receive enough if they received the surrender value. None of the policies in question is payable to the bankrupt or his estate. In the Hammel
87 case we held that though the bankrupt could have changed the beneficiary to himself and could then have borrowed the cash value of the policy from the company, he could not be compelled to do so. This conclusion we think in line with the reasoning of the Supreme Court in Burlingham v. Crouse and in Everett v. Judson, and therefore the orders are affirmed.

88 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In the Matter of Elias W. Samuels, Bankrupt. Opinion. Ward, Circuit Judge. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 14, 1916. William Parkin, Clerk.

89 United States Circuit of Appeals for the Second Circuit.

In the Matter of ELIAS W. SAMUELS, Bankrupt; SAMUEL C. COHEN, as Trustee, etc., Petitioner.

HOUGH, *J.*, dissenting:

The rule on this subject is set forth in one sentence from Burlingham vs. Crouse, 228 U. S., at p. 473, viz: "As we have construed the statute its purpose was to vest the surrender value in the trustee for the benefit of the creditors and not otherwise to limit the bankrupt in dealing with his policy."

In that case there was at the time of bankruptcy no surrender value. Therefore there was nothing for the trustee to get.

In Everett vs. Judson, 228 U. S., 474, there was a surrender value, and the trustee received it.

In Re L. Hammel & Co., 221 Fed. Rep., 56, the policy possessed "no cash surrender value either provided for on its face or established by concession and practice of the Company" (p. 57).
90 What we refused in that litigation was to compel the bankrupt to get the policy back from his wife and borrow upon it for the benefit of his estate. No other point was involved.

All of the policies in this case have a cash surrender value, and the only reason why that value is thought not to flow into the bankrupt's estate is the fact that the bankrupt prefers to keep the policies payable to beneficiaries chosen by himself but whose rights he can cancel at will.

This bankrupt is the assured; he is the only person who can obtain the surrender value; he can get it when he wants it, and no one else can.

Samuels' property in these policies was transferable by him, was subject to be applied to the satisfaction of his debts under the laws of the State, and possessed (in the language of the Bankruptcy Act)

"a cash surrender value payable to himself." It is so payable in equity, because h ecan get it,—and bankruptcy is equty.

Therefore the order should be reversed under the construction of the Act as above quoted. For these reasons I dissent from the judgment of the Court.

91 (Endorsed:) United States Circuit Court of Appeals, Second Circuit. In the Matter of Elias W. Samuels, bankrupt; Samuel C. Cohen, as Trustee, etc., Petitioner. Opinion. Hough, J., dissenting. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 14, 1916. William Parkin, Clerk.

92 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 24th Day of November, One Thousand Nine Hundred and Sixteen.

Present:

Hon. Alfred C. Coxe,
Hon. Henry G. Ward,
Hon. Charles M. Hough.
Circuit Judges.

In the Matter of ELIAS W. SAMUELS, Bankrupt; SAMUEL C. COHEN, as Trustee, etc., Petitioner.

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed with costs.

A. C. C.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

93 Endorsed: United States Circuit Court of Appeals, Second Circuit. In re Elias W. Samuels. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 24, 1916. William Parkin, Clerk.

94 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 93 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of In re Elias W. Samuels, Bankrupt, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 1st day of December in the year of our Lord One Thousand Nine Hundred and sixteen and of the Independence of the said United States the One Hundred and forty-first.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

95 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Samuel C. Cohen, as Trustee in Bankruptcy of Elias W. Samuels, Bankrupt, is petitioner, and Elias W. Samuels is respondent, which suit was removed into the said Circuit Court of Appeals by virtue of a petition to superintend and revise from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the
96 United States, Do hereby command you that you send without delay to the said Supreme Court as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eighteenth day of April, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 25,685. Supreme Court of the United States, No. 855, October Term, 1916. Samuel C. Cohen, as Trustee, etc., vs. Elias W. Samuels. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 28, 1917. William Parkin, Clerk.

97 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of ELIAS W. SAMUELS, Bankrupt; SAMUEL C. COHEN, as Trustee, etc., Petitioner.

Stipulation.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that the certified copy of the transcript of record in the above entitled matter on file in the office of the Clerk of the Supreme Court of the United States, in the matter of the application of the trustee herein for a writ of certiorari to the Circuit Court of Appeals, Second Circuit, — be the return to the writ of certiorari granted by the United States Supreme Court on April 18, 1917, and

It is further stipulated and agreed that a certified copy of this stipulation may be sent by the Clerk of this Court as his return to the said writ.

Dated, New York, April 27 1917.

SAMUEL STURTZ,
Attorney for Bankrupt.
LAWRENCE B. COHEN,
Attorney for Trustee.

98 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made, having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York April 30th, 1917.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Endorsed:] 855/25,685. United States Circuit Court of Appeals, Second Circuit. In re Elias W. Samuels, Bankrupt. Return to Certiorari.

99 [Endorsed:] File No. 25,685. Supreme Court U. S., October Term, 1916. Term No. 855. Samuel C. Cohen, as Trustee, etc., Petitioner, vs. Elias W. Samuels. Writ of certiorari and return. Filed May 2, 1917.

No. 359

United States Supreme Court

OCTOBER TERM, 1916.

SAMUEL C. COHEN, as Trustee in Bankruptcy of Elias W. Samuels, Bankrupt,

Petitioner,

vs.

ELIAS W. SAMUELS,

Respondent.

Petition for Writ of Certiorari, Notice of Motion and Brief in Behalf of Petitioner.

LAWRENCE B. COHEN,
64 Wall Street,
Borough of Manhattan,
New York City.

ADOLPH BOSKOWITZ,
MYRON L. LASSER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1916

SAMUEL C. COHEN as Trustee in Bankruptcy of Elias W. Samuels, Bankrupt, Petitioner,	Notice of Motion.
against	Docket #855
ELIAS W. SAMUELS, Respondent.	

SIRS:

Please take notice, that upon a certified copy of the transcript of the record herein, and upon the annexed petition of Samuel C. Cohen, sworn to on the 4th day of January, 1917, I shall make a motion hereto annexed before the Supreme Court of the United States, at the Capitol in the City of Washington, District of Columbia, on the 5th day of February, 1917, at the opening of the Court on that day or as soon thereafter as counsel can be heard; and that I shall then and there move for such further relief in the premises as may be just.

Dated, New York City, N. Y., January 11th, 1917.

Yours, &c.,

LAWRENCE B. COHEN,
Counsel for Samuel C. Cohen, Petitioner,
64 Wall Street.
New York City, N. Y.

To:

SAMUEL STURTZ, ESQ.,
Attorney for Respondent,
198 Broadway,
New York City, N. Y.

IRVING L. ERNST, ESQ.,
Counsel for Respondent,
170 Broadway,
New York City, N. Y.

SUPREME COURT OF THE UNITED STATES
OF AMERICA,
OCTOBER TERM, 1916.

SAMUEL C. COHEN as Trustee in Bankruptcy of Elias W. Samuels, Bankrupt, Petitioner, against ELIAS W. SAMUELS, Respondent.	Docket #855.

And now comes the petitioner, Samuel C. Cohen by Lawrence B. Cohen, his counsel, attorney-at-law, and moves this Court, upon a certified copy of the transcript of the record herein, and upon the annexed petition sworn to on the 4th day of January, 1917, for a writ of certiorari, directed to the Circuit Court of Appeals for the Second Circuit and to the District Court of the United States for the Southern District of New York, to bring before this Honorable Court the case of Samuel C. Cohen as trustee in bankruptcy of Elias W. Samuels, bankrupt, against Elias W. Samuels, recently decided by the Circuit

Court of Appeals for the Second Circuit, and by the District Court of the United States for the Southern District of New York, for such proceedings therein as to this Court may seem just; and for such other and further relief in the premises as may be just.

LAWRENCE B. COHEN,
Counsel for Petitioner, Samuel C. Cohen,
64 Wall Street.
New York City, N. Y.

SUPREME COURT OF THE UNITED STATES OF AMERICA,
OCTOBER TERM, 1916

SAMUEL C. COHEN as Trustee in Bankruptcy of Elias W. Samuels, Bankrupt, Petitioner,	Petition for Writ of Certiorari
against	
ELIAS W. SAMUELS, Respondent.	

To the Supreme Court of the United States:

The petition of Samuel C. Cohen as trustee above named respectfully shows to this Court as follows:

First: That on May 13, 1915, respondent filed a voluntary petition in bankruptcy and was adjudicated a bankrupt on that day. Your petitioner was thereafter duly elected trustee in bankruptcy of said respondent and duly qualified and is still acting as such trustee. That said respond-

ent at the time of his adjudication in bankruptcy held five life issurance policies on his own life written by various companies.

Second: On September 16, 1915, your petitioner duly brought on motions before the referee in bankruptcy herein requiring the bankrupt to turn over to him said policies, or in the alternative pay or secure to him their surrender value as of the date of adjudication in bankruptcy. That said motions were denied by the said reference on December 30, 1915.

Third: That on January 18, 1916, your petitioner duly filed petitions to review said ruling and order of said referee, as to three of said policies, before the United States District Court for the Southern District of New York. A hearing of said matter was duly had before the said Court on February 14, 1916, and an order was duly entered by said Court on March 7, 1916, affirming the orders of the referee. The grounds of said decree and the ruling of the learned trial Judge are briefly stated on page 33 Transcript of of Record, submitted herewith.

Fourth: From the said decree of said United States District Court, an appeal was duly taken by petitioner on the 17th day of March, 1916, to the Circuit Court of Appeals for the Second Circuit, resulting in a decision handed down on the 14th day of November, 1916, affirming the decree of said District Court. The Circuit Court of Appeals accompanied its decision with an opinion, written by Hon. Judge Ward (Transcript of Record, pages 83-88), and a dissenting opinion written by Hon. Judge Hough (Transcript of Record, pages 89-90). Hon. Judge Hand is in accord with Hon. Judge Hough so that we have an equal number of Judges pro and con.

Fifth: The District Court made its decision on the authority of In the Matter of L. Hammel & Company, 221 Fed., 56, and the Circuit Court affirmed its decision on that case, which it concluded was in line with the reasoning of the Supreme Court in Burlingham v. Crouse, 228 U. S., 459, and in Everett v. Judson, 30 A. B. R., 1—these cases dealing with the interpretation of Section 70a of the Bankruptcy Act.

Sixth: Neither the Hammel nor Burlingham v. Crouse cases apply to the case at bar while the Everett case is in its favor, as will be more fully shown in petitioner's brief.

Seventh: At the date of filing the petition and adjudication, the bankrupt held three policies of life insurance on his own life, which policies then had a surrender value and wherein married sisters and a niece were designated as beneficiaries and the bankrupt reserved the power to change at pleasure any and all beneficiaries—so that the bankrupt could by substituting himself as beneficiary obtain their surrender value, without the consent of the designated beneficiaries, according to a recognized usage and custom of the insurance companies which permits such payment to be made before the policies lapse.

Eighth: The said policies are not exempt under the laws of the State of New York, nor under the Bankruptcy Act, but Section 70a of that Act prescribes how such policies are to be dealt with.

Ninth: Said Section 70a provides (a) that the trustee shall be vested by operation of law with the title of the bankrupt to all (3) Powers which he might have exercised for his own benefit (5) Property which he could by any means have transferred, *provided* that if he shall have any insurance policy which has a cash surrender value *payable to himself, his estate, or personal repre-*

sentatives, he pay or secure to the trustee the sum thereof, and he can then hold such policy free from the claims of creditors of his estate in bankruptcy, otherwise the policy shall pass to the trustee as assets.

Tenth: The trustee contended that though the policies do not contain the descriptive words of the proviso "payable to himself, his estate or personal representatives," the trustee was vested with the power to make them so payable and obtain their surrender value from the companies, or from the bankrupt and if the latter did not pay or secure it to the trustee, the policies would pass to him as assets.

The bankrupt contended that as the policies do not contain the identical words of the proviso, but contain the names of third parties as designated beneficiaries, these policies have no surrender value and nothing is to be paid or secured to the trustee and that the bankrupt can hold these policies free from the claims of creditors of his estate in bankruptcy.

These respective contentions were the principal subjects of litigation, but involved therein is the further contention of the trustee that he has the power to change the beneficiary to himself or to the bankrupt's estate under Section 70a, paragraph 3, and obtain the surrender value, while the bankrupt contends the contrary and that the trustee has not such power and that therefore there is no surrender value and the trustee is prevented from getting anything, although this beneficial power is property of the bankrupt.

If the decision of the lower Court is right, creditors' money may be used to buy insurance and by merely having inserted in the policies the names of third parties as designated beneficiaries instead of inserting the precise technical de-

scription contained in the proviso, and by reserving the power to change beneficiaries at pleasure, such policies will not become assets of a bankrupt's estate and he will have made provision and acquired property for himself which cannot be reached before or during bankruptcy, nor after his discharge therefrom—an invulnerable financial reservation created by the bankrupt for himself having a present monetary value, which would be proof against every form of hostile endeavor by creditors.

Eleventh: It is important that this Court establish the law in respect to the questions involved in this case, relating to these and similar insurance policies, so that there shall be an uniformity of decisions in all Federal Jurisdictions.

Both before and after the decisions in Burlingham vs. Crouse and in re Hammel, supra, lower courts in many different Jurisdictions, have rendered conflicting decisions, thereby causing much confusion. This confusion continues notwithstanding these decisions. This is forcibly illustrated under our Point I, where many cases are quoted from and analyzed.

In the Hammel case the question of public policy is incidentally discussed in respect to the proviso respecting insurance policies in which third parties are the designated beneficiaries, but in Holden v. Stratton, 198 U. S., 202, 213, the Court said, "The purpose of the proviso is to confer a benefit upon the insured bankrupt."

The amount involved in the case at bar is not large, but there are ten policies having a surrender value of about $2,900 belonging to certain of the bankrupt's brothers who were also in bankruptcy, awaiting the final result to be reached in this case.

Twelfth. Herewith filed is a correct transcript of the record of the proceedings in the Circuit Court of Appeals for the Second Circuit and of the District Court for the Southern District of New York and in addition thereto certified copies of the opinions of said Courts and of the dissenting opinion of Judge Hough, and of the order made by said Court of Appeals affirming the decree of the District Court.

Thirteenth: That the questions which your petitioner desires among other things to review in this Court are:

1. The error of the Court below in its interpretation of Section 70a paragraphs (a), (3), (5) and the proviso in the latter.

2. Whether the cases of Burlingham v. Crouse and Hammel, supra, are authority for the decision in the case at bar.

3. Whether the diversity of interpretation of the Burlingham v. Crouse and Hammel cases shall be maintained in the various jurisdictions, or whether petitioner shall not be allowed the same relief as is granted in other jurisdictions.

4. That surrender value is other than the full reserve of the policies after three years premiums have been paid.

5. That general beneficial powers of appointment are not property in the hands of the donee.

6. That although the bankrupt reserved the power to change beneficiaries at pleasure, that power does not vest in the trustee by operation of law.

7. Whether the bankrupt should not be compelled or the trustee permitted to exercise the power to substitute himself or the bankrupt's estate in lieu of the designated beneficiaries.

8. That public policy is involved in this case beyond the benefit to the bankrupt as expressed in the proviso.

9. That beneficiaries in insurance policies have a mere expectancy and contingency in the policies and no interest whatever, vested or contingent, in their surrender value unless the assured revokes his power to change beneficiaries, which was not done.

And your petitioner respectfully submits that these questions are of sufficient importance to render it proper for this court to issue a writ of certiorari for the following reasons, among others:

1. Because the decree of the Circuit Court of Appeals for the Second Circuit holds that unless the beneficiary designated in the policies conforms technically in haec verba to the description in the proviso, the policies have no surrender value.

2. Because in the Burlingham v. Crouse case there was no surrender value, and in the Hammel case there was a loan value but no surrender value.

3. Because it is important to reconcile the conflict with respect to the Burlingham v. Crouse and Hammel cases existing in various jurisdictions.

4. Because the surrender value of policies is the reserve mentioned in the policies, regardless of the designated beneficiary therein.

5. Because the reserved power by the bankrupt to change beneficiaries at will is property in his hands.

6. Because the power reserved by the bankrupt to change beneficiaries at will vests in the trustee by operation of law.

7. Because of the disability of the bankrupt he could not be compelled to exercise the power he reserved, but the trustee can and should have been permitted to substitute himself or the bankrupt's

estate for the designated beneficiaries and obtain the surrender value of the policies.

8. Because the public policy of the proviso is limited to the redemption of insurance policies by paying or securing to the trustee their surrender value, neither he nor members of his family, relatives or strangers can claim any other benefits on that ground.

9. Because designated beneficiaries have no vested interest in the surrender valne of the policies but a mere expectancy or contingency in the policies where the assured has reserved the power to change beneficiaries.

10. Because proceedings are now pending involving ten other policies the surrender value of which is over $2,900 and there are no doubt many cases in other jurisdictions awaiting the result in this case.

Wherefore, your petitioner prays that this Honorable Court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Second Circuit to bring up this case to this Honorable Court for such proceedings therein as to this Honorable Court may seem just.

Dated, New York, January 4, 1917.

SAMUEL C. COHEN,
Petitioner.

LAWRENCE B. COHEN,
Attorney for Petitioner,
Office & P. O. Address,
64 Wall Street,
Borough of Manhattan,
New York City.

State of New York, }
County of New York. } ss.:

Samuel C. Cohen, being duly sworn, deposes and says that he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

SAMUEL C. COHEN.

Sworn to before me this 4th
day of January, 1917.

MAX ROTHENBERG,
Notary Public,
New York County, No. 146.

(SEAL)

SUPREME COURT OF THE UNITED STATES,

SAMUEL C. COHEN as Trustee in Bankruptcy of Elias W. Samuels, Bankrupt,
Petitioner,
against
ELIAS W. SAMUELS,
Respondent.

Petitioner's Brief.

Statement of the Case.

The petitioner who is the trustee in bankruptcy of the respondent made application to the United States District Court for the Southern District of New York that, in the alternative there be turned over and delivered to him by the bankrupt, three policies of life insurance or that he pay or secure to the Trustee the cash surrender value thereof.

The said policies are in force and are not exempt; they had a surrender value at the date when the bankrupt filed his petition and was adjudicated a bankrupt; the bankrupt is the insured and the designated beneficiaries are his married sisters and niece; he reserved the right to change beneficiaries at pleasure and upon making himself the beneficiary in the place of those designated, the insurance companies, by a recognized custom, will pay to the insured bankrupt, their surrender value, without requiring the consent of the designated beneficiaries.

The Trustee's contention before the District Court for the Southern District of New York and the Circuit Court of Appeals for the Second Circuit was that under the Bankruptcy Act, Sec. 70a, paragraphs (a), 3 and 5 and the proviso contained therein he is vested by operation of law with the title to these policies to the extent of their surrender value and if that is not paid or secured to him, to the policies themselves

as being unexempt property of the bankrupt; that inasmuch as the bankrupt retained the power to change the beneficiary at any time and without their consent that power passed to the trustee, so that he can make himself or the bankrupt's estate the beneficiary and collect the surrender value for the benefit of the bankrupt's estate; that the designated beneficiaries have no vested interest, past, present or future, in the surrender value and only a mere expectancy or contingency in the policies themselves at their maturity or at the bankrupt's death, as he has the power to make himself or any other party the beneficiary prior to the happening of either of these two events.

The decision of the District Court is adverse to the Petitioner (Page 33, Transcript of Record).

The decision of the Circuit Court of Appeals is also adverse to the Petitioner (Page 83, Transcript of Record), but Judge Hough dissented from the decision of that Court (Page 89, Transcript of Record).

POINTS.

I

No other Circuit Court of Appeals has rendered a decision on the questions involved in the case at bar. Contrary decisions have been made by District Courts in other jurisdictions after as well as before the decision of the Court below was made.

The Court below is the only Circuit Court of Appeals which has decided the questions in the case at bar. Notwithstanding which, District Courts in other jurisdictions have since then made

contrary decisions. The decision by this Court is necessary in order to remedy this diversity and to establish uniformity in all jurisdictions.

While the relief prayed for by the petitioner was denied him in the jurisdiction of said Courts, it would have been granted in other jurisdictions, thereby putting him at a disadvantage with suitors there. Such a condition is contrary to the intent and spirit of the law, which is enacted to obtain uniformity and to embrace the whole country.

We quote only from recent decisions since In re Hammel, supra, which was decided February 1915.

In re Dreuil, 221 Fed. Rep., 797, District Court, Eastern District of Louisiana, the Court said in the opinion by Foster, J.:

> " It may be considered settled that only " the cash surrender value of a life insur- " ance policy passes to the trustee and this " must be ascertained as of the date of adju- " dication (citing Hiscock v. Mertens, 205 " U. S. 202, Burlingham v. Crouse, 228 U. S., " 459, Everett v. Judson, 228 U. S., 474).
> " And where the policy is terminated be- " fore its maturity the rights of both the in- " sured and the beneficiary may be deter- " mined by an actuary under the principles " applying to life insurance generally.
> " **The trustee will probably experience " no difficulty in inducing the actuary of " the company to work out the relative in- " terests of the beneficiary (the wife) and " the bankrupt, and when that is done the " bankrupt may be granted the right to " redeem the policy within thirty days in " default of which the trustee will be di- " rected to sell his interest in the policy. " (Carr v. Hamilton, 129 U. S. 292)."

In re Bonvillain, 232 Fed. Rep., 372, District Court, Eastern District of Louisiana, decided April, 1916, it was held, by Foster, J.:

> " They (the policies) were originally pay-
> "able to Bonvillain the insured or his estate,
> "but some years before bankruptcy had been
> "assigned by him to his wife, with full res-
> "ervation of his right to change the bene-
> "ficiary at will. Undoubtedly the policies
> "are such as would pass to the trustee unless
> "exempt. (Citing in re Herr, 182 Fed. Rep.,
> "716, In re Jamison Bros., 222 Fed., 93, In
> "re Shoemaker, 222 Fed., 330, Hiscock vs.
> "Mertens, 205 U. S. 202)."

In Matter of Jamison Brothers, 222 Fed. Rep., 93, District Court, Eastern District of Pennsylvania, decided April, 1915, the Court stated as follows, by Dickinson, J.:

> " We are of opinion that whatever may be
> "the case in other jurisdictions the rulings
> "by which we are bound do not leave open
> "to discussion these propositions.
> " 1. Where there has been a designation of
> "a beneficiary to receive the money payable
> "on the death of the insured and this desig-
> "nation is open to recall or change by the
> "insured to whom also belongs the right to
> "cancel or surrender the policy if the in-
> "sured be bankrupt, the surrender value of
> "the policy passes to his *trustee.*" (The wife was the designated beneficiary.)

In Matter of Shoemaker, 222 Fed. Rep., 330 District Court, Eastern District of Pennsylvania, decided July, 1915, Thompson, J., cites with approval the paragraph in Jamison Brothers, supra, and the Court says:

"I am entirely in accord with the fore-
"going proposition so tersely and clearly
"stated by Judge Dickinson and they rule
"the case at bar. There has been merely a
"designation of the beneficiary which is open
"to recall or change by the insured and to
"him also belongs the right to cancel or sur-
"render the policy. The policy was not with-
"in the meaning of the Pennsylvania Act of
"1868 'taken out for the benefit, or *bona fide*
"assigned to' the daughter of the insured,
"Florence M. Shoemaker, for by the terms
"of the policy the insured may at any time
"take away her interest by changing the
"beneficiary without her consent. * * *
"That an order be entered allowing the
"bankrupt to pay or secure to the trustee the
"sum ascertained as the cash surrender value
"and that otherwise the policies shall pass
"to the trustee as assets in accordance with
"the provisions of section 70a of the Bank-
"ruptcy Act."

In Matter of Flanigan, 228 Fed. Rep., 339, District Court, Eastern District of Pennsylvania, decided December, 1915, the Court said:

"The naming of a beneficiary is nothing
"more than a direction to the insurance com-
"pany to pay the insurance moneys, when
"they become payable to the beneficiary. If
"the insured may change the beneficiary at
"will he still owns the other contract which
"gives him the right to cancel the policy
"and receive the surrender value. *This right*
"passes to his trustee in bankruptcy and may
"be exercised by the trustee. Hence the rul-
"ing (followed by the referee in this case)
"that where there is nothing more than the
"naming of the wife and this is revocable
"by the husband, then the trustee may sur-
"render the policy and receive the surren-
"der value and he does not lose this right
"unless paid an equivalent sum."

In Matter of Cohen, 230 Fed. Rep., 733, decided by the District Court, District of Georgia, the beneficiary was the wife and the policy had a surrender value. The bankrupt reserved the right to change the beneficiary; the laws of Georgia provided that the assured may direct the proceeds of a policy to be paid to his personal representatives, widow or children, and if this is assented to by the insurer, no other person can defeat the same, but the assignment is good, however, without such assent. It was held that Section 70a did not apply, and that under the Statute of Georgia, construed in connection with it, the trustee did not take title to the cash value of the policy and independent of the Georgia Statute the trustee takes no title to the cash value as that would subtract that amount from the interests of the wife and to that extent make her liable for her husband's debts, contrary to the Georgia Code, Paragraph 2993.

A brief analysis of some of the numerous cases decided in the different jurisdictions before In re Hammel, supra, was decided, is given herewith.

The case of Andrews v. Partridge, 228 U. S., 479, decided by the Supreme Court in April, 1913, held that the trustee was entitled to the surrender value. In that case the beneficiaries were the executors, administrators and assigns of the bankrupt.

In Matter of Churchill, 209 Fed. R., 766, decided by the Circuit Court of Appeals, 7th Circuit, October, 1913, the beneficiary was the wife; the bankruptcy occurred in 1910, and the policy provided it would have no surrender value until 1912. It was held that the policy had a surrender value by usage and custom of the Insurance Company, and that it passed to the trustee.

In Matter of Young, 208 Fed. R., 373, decided by the District Court, Northern District of Ohio, September, 1912, the facts and decisions were as follows:

Policy 1—The beneficiary was the wife; the bankrupt retained the power to change the beneficiary and obtain the surrender value without her consent. It was held that the policy could not be sold by the trustee.

Policy 2—The beneficiary was the wife; the bankrupt had no power to change the beneficiary. The policy had a surrender value at certain periods, which included the date of bankruptcy, and the bankrupt could obtain it without the wife's consent. It was held, the policy could not be sold by the trustee.

Policy 3—The beneficiary was the wife, and the bankrupt retained the power to change the beneficiary. The Court held that the policy passed to the trustee and could be sold by him.

Policy 4—The beneficiaries were the children or executors, administrators or assigns. The policy had a surrender value payable to the children after ten years, and five years thereafter to the bankrupt, who had no power to change the beneficiary. It was held that the bankrupt had no interest in the policy and that it did not pass to the trustee.

In Matter of Pfaffinger, 164 Fed. R., 526, the beneficiary was the wife; the bankrupt had power to change the beneficiary. The policy had a surrender value. The statutes of Kentucky provided that a lawful beneficiary having an insurable interest is entitled to the proceeds of the policy as against creditors or the insured's representatives. It was held that neither the policy nor its surrender value passed to the trustee.

In Matter of Joseph Hermick, 1 A. B. R., 713, decided by the District Court, District of Maryland, the beneficiary was the bankrupt. The policy had a surrender value, but the opinion does not state whether the bankrupt reserved the power to change the beneficiary. The Court held that the surrender value does not pass to the trustee under Section 70a.

In Matter of McDonnell, 101 Fed. R., 239, decided by the District Court, District of Iowa, April, 1900, the beneficiary was the bankrupt, and no particulars in regard to the policy are stated in the opinion. It was held, the bankrupt had no interest in the policy which the trustee could claim under Section 70a. The Court stated:

> " In these policies the bankrupt is named
> " as the beneficiary, but he is not the con-
> " tracting party with the Company, nor would
> " the surrender value be payable to him or
> " his Estate, and, therefore, the trustee has
> " no interest therein."

In the case of Holden v. Stratton, 198 U. S., 202, decided by the Supreme Court, 1905, the beneficiary was the wife, and the policy had a surrender value. No other particulars are stated as to the policy, which was exempt under the laws of the State of Washington. The Court held that in exempt policies nothing passes to the trustee and intimated that even if the policies did not provide for payment of surrender value, but the Companies will pay such value, the policy then comes within the meaning of Section 70a, and the Court cites with approval on this point, the case of In re McKinney, 15 Fed. R., 535.

In re Orear, 178 Fed. R., 632, decided by the Circuit Court of Appeals, 8th Circuit, the beneficiaries were the wife in some policies and sis-

ters in others. The policies had a surrender value. The bankrupt reserved the power to change the beneficiaries. The statute of Missouri exempted policies in which the wife was the beneficiary. It was held that all the policies passed to the trustee whether the surrender value was provided in the policies, or by a concession of the companies, except where the wife was the beneficiary.

In re Welling, 113 Fed. R., 189, the beneficiary was the wife. The policy had an actual value. The opinion does not state whether the bankrupt reserved the power to change the beneficiary. The Court held that though the policy had no "surrender value" and was not covered by Section 70a, the bankrupt's right which was to receive payment at completion of tontine period, was a vested right of property having an actual value, and it passed to the trustee under Section 70a, Paragraph 5.

In re Herr, 188 Fed. R., 716, decided by the District Court, Middle District of Pennsylvania, November, 1910, the beneficiary was the wife, and the policy had a cash surrender value and the bankrupt retained the power to change the beneficiary. The policy was not exempt under the Pennsylvania laws. It was held that the wife's interest was contingent, as the bankrupt had the power to change the beneficiary, and the surrender value was directed to be paid to the trustee. That the bankrupt's absolute dominion over the policy made it his property, subject to the right to redeem. The Court said:

> " While the wife, as it stands, is the con-
> "tingent beneficiary, the policy is under
> "the control of the bankrupt and he may
> "change the situation at any moment and
> "realize upon it without regard to her, either

"giving it up and get the surrender value,
"or continuing it with a newly designated
"beneficiary just as he may choose."

In Matter of White, 174 Fed. Rep., 333, the beneficiary was the wife and the policy had a surrender value, and the bankrupt had the power to change the beneficiary. It was held that the surrender value was to be paid to the trustee; that the policy was the bankrupt's, and that the wife's interest therein was contingent. It was further held that the Domestic Relations Law of New York, Section 52, does not apply because the policy is not her absolute property. That though surrender value is not provided in the policy, the company's willingness to have it surrendered and pay the surrender value amounts to the same thing as if the policy contained a stipulation of the payment of the cash surrender value.

In re Wolff, 165 Fed. R., 984, decided by the District Court, Eastern District of New York, December, 1908, the beneficiary was the wife and the policy had a surrender value. The bankrupt reserved the right to change the beneficiary. The wife had paid premiums for some years before bankruptcy and the bankrupt and the wife had made a loan on the policy. The Court held that the surrender value passed to the trustee less the amount of the loan. That the Domestic Relations Law of New York, Section 52, does not apply, because the policy was not the wife's absolute property, by reason of the fact that the bankrupt reserved the right to change the beneficiary.

In re Loveland, 192 Fed. R., 1005, decided by the District Court, District of Massachusetts, January 1912, and later by the Circuit Court of Ap

peals, First Circuit, 200 Fed. R., 136, the beneficiary was the wife, and the policy had a surrender value. The bankrupt reserved the right to change the beneficiary. The Massachusetts law exempted the policies in favor of the wife or other persons than the insured. The Circuit Court of Appeals held that the bankrupt should assign his rights in the policy to the beneficiary.

In re McKinney, 15 Fed. R., 535, decided by the District Court, Southern District of New York, March, 1883, the beneficiaries were the executors, administrators or the assigns. The bankrupt's wife had paid the premiums up to October 31, 1882. Thereafter McKinney died, and creditors claimed the policy passed to the assignee in bankruptcy. The widow contended that the assignee was not entitled to any interest. The Court stated as follows:

> " To the extent of its actual cash surren-
> " der value, therefore, at the time of the bank-
> " ruptcy, it was property and effects of the
> " bankrupt within sections 5044, 5046 of the
> " Revised Statutes and as such passed to the
> " bankrupt's assignee. So far as necessary
> "to make the cash surrender value available
> " the title to the policy also passed to the
> " assignee, so that he might thereafter either
> " surrender it to the company, or assign it
> " over, either to the bankrupt or to any other
> " person having an insurable interest on his
> " life. On receiving payment of the surrender
> " value at that time, or so much of it as the
> " assignee might obtain."
> " Beyond this interest in the surrender value
> " I think nothing passed to the assignee in
> " bankruptcy save the naked title to the pol-
> " icy in order to make that interest available.
> " As an executory contract, aside from its
> " surrender value, the policy had no pecuni-
> " ary value whatsoever."

The Court further held: The surrender value at time of bankruptcy passed to the trustee.

Although this case was decided under the Bankruptcy Act of 1868, it is nevertheless cited with approval by this Court in Burlingham v. Crouse, 228 U. S., 459; Hiscock v. Mertens, 202 U. S., 220, and Holden v. Stratton, 198 U. S., 202.

There are numerous other cases in different jurisdictions, in which conflicting decisions were made, which, in order to prevent this brief from becoming too bulky, we have not analyzed, but a sufficient number has been dealt with to show to this court the hopelessness of harmonizing them and that no uniformity is possible until this Court shall have passed upon this case, as prayed for by petitioner herein.

II

The interpretation of the Court below of Section 70a of the Bankruptcy Act is too narrow and does not give full effect to all the paragraphs and the proviso contained therein.

When all the paragraphs of section 70a are read together, as they must be, the conclusion follows that the trustee in bankruptcy is vested by operation of law with the title to all unexempt property of the bankrupt. Included therein are first, all powers which he might have exercised for his own benefit, such powers being generally recognized as property, and second, all property, which he could have transferred. In the case of life insurance policies having a surrender value payable to himself, his estate or personal representatives, the trustee's title vests in these pol-

icies to the extent only of such value if paid or secured to him, otherwise the policies pass to him as assets.

The main issues in the case at bar are these: The policies are not payable to "the bankrupt himself, his estate or personal representatives," which is the description contained in the proviso, but to married sisters and a niece of the bankrupt. The Circuit Court of Appeals held that the policies have no surrender value, although that value is the full reserve after three years premiums have been paid, as stated in the policies and as fully described and interpreted in Re McKinney, 15 Fed. Rep., 535. No matter who may be designated as beneficiary in the policies their surrender value remains unaffected thereby, as it is created only by the means stated. These policies, therefore, had a surrender value at the date of filing of the petition in bankruptcy and adjudication of the bankrupt.

The bankrupt retained the power to change at pleasure the beneficiaries designated in the policies. The policies and the power which he did not exercise for his own benefit are his property and the title therein vests in the trustee by operation of law, except so far as limited by the proviso contained in section 70a subdivision 5. Hence the trustee had power to substitute himself or his estate as beneficiary in place of those designated and the policies should pass to the trustee as assets unless their surrender value is paid or secured to him by the bankrupt. It is thus established that these policies have a surrender value and that the trustee is vested with the power to obtain it.

By merely changing the beneficiary to himself or his estate, the trustee will be paid the sur-

render value of the policies by the insurance companies, according to an established and recognized custom, just as they would do before or after bankruptcy to the bankrupt.

The designated beneficiaries have no vested interest present, past or future, in the surrender value but have only a mere expectancy or contingency in the policies at their maturity or at the bankrupt's death, so long as he retains the power to change beneficiaries. "The purpose of the proviso was to confer a benefit upon the insured" (Holden vs. Stratton, 198 U. S., 202, 213), and not upon any beneficiary, whether members of his family, relatives or strangers.

The petitioner's contention is that the trustee has the power to obtain the surrender value of these policies as hereinabove stated. If it were otherwise, a bankrupt could use creditors' money, buy insurance therewith, make the policies payable to any relative or third party instead as described in the proviso and then hold the policies before, during and after his discharge from bankruptcy, without, while in bankruptcy, paying their surrender value to the trustee. By a mere change of words the bankrupt will have made a provision for himself which survives bankruptcy and will have acquired property which is invulnerable against every form of legal but hostile endeavors by creditors. We submit that this is contrary to the intent and meaning of this section of the Bankruptcy Act.

III

Neither Burlingham vs. Crouse, 228 U. S., 459, nor in re Hammel, 221 Fed. Rep., 56, have any application to the case at bar and the case of Everett vs. Judson, 228 U. S. 474, supports the trustee's contention.

A short analysis of these cases will demonstrate their inapplicability to this case.

In the Burlingham vs. Crouse case, supra, several years before bankruptcy, McIntyre, the bankrupt, had *assigned* his policies to McIntyre & Co., of which firm he was a member, subject to a loan previously made to him individually by the insurance companies. Two months prior to bankruptcy the policies were *assigned* to Crouse as collateral security for a loan he had made to the firm and subject to the loan made by McIntyre from the insurance companies. At the date of filing of the petition and adjudication in bankruptcy of the firm, the policies had no surrender value, as the amount of same was exhausted by the loan made by McIntyre before he assigned the policies to the firm, hence there was nothing that would pass to the trustee and the proviso in Sect. 70a could not be availed of by him. It may be inferred, however, that if there had been a surrender value the trustee would have got it in accordance with the proviso.

It is of special significance that the surrender value of these policies was dealt with without regard to the beneficiary or assignee named therein. It was held also that as the policies had no surrender value at the date of bankruptcy, they were exempt property and the assignment to Crouse was valid though made two months before

bankruptcy. The only reason that the trustee did not gain title to the policies was because they had no surrender value.

In the case at bar, the policies have a surrender value; they have not been assigned (except as a lien to the extent of loans from the insurance companies) and no one but the bankrupt has a vested interest in them; the designated beneficiaries are third parties and may be changed at pleasure by the bankrupt at any time before death or before maturity of the policies; meanwhile, these beneficiaries have only a contingent interest, liable to be divested at any moment, or they have the mere expectancy of being still beneficiaries at maturity of the policies or at the bankrupt's death; the bankrupt may change the beneficiary to himself and obtain the amount of the policy at maturity, or surrender the policy at any time, or if not surrendered it would become an asset of his estate at death. All these things the bankrupt could do before bankruptcy, as the contract of insurance is solely between him and the insurance companies, in which no one else has any interest, hence the consent of the designated beneficiaries is not necessary to perform any or all the acts enumerated. But while he is under the disability of bankruptcy, the trustee only can perform these acts, except as limited by the proviso, and it is within these limits the trustee is seeking to establish his rights in this case.

In re Hammel, supra, the policy had no surrender value; it had a loan value; the designated beneficiary was the bankrupt's wife; the bankrupt retained the power to change at pleasure the beneficiary, but the insurance company would make a loan only with the wife's consent. The court held that it would not compel the bankrupt to make a

loan, as non-compliance would be contempt of court and subject the bankrupt to imprisonment, and that it was against public policy to make a loan and turn over the amount thereof to the trustee, as it would diminish the amount of the policy and the beneficiary would suffer to that extent. But the court also said: "Possibly the trustee, if the designation were changed to insured's estate, might himself obtain the amount of the loan from the company—that proposition need not be passed upon"—plainly indicating that if the trustee himself had made application to make the loan, it would have been granted and the sum thus obtained would have become an asset of the bankrupt's estate. We submit that this proposition was a vital issue and should have been passed upon, and it is one of the questions on which this court is respectfully petitioned to render its decision.

In the case at bar, the policies have a surrender value, the trustee makes the application to obtain it, recognizing the disability of the bankrupt to do so. The extent of the public policy invoked is satisfied by the proviso in Section 70a, which is for the benefit of the *bankrupt only*, and neither by words nor implication does it include any other person. But even if the wife were to share in this benefit, could it also apply to married sisters and nieces? If any one but the bankrupt is to have the benefit of the proviso then it can be extended to the remotest relatives or even strangers and the statute would include what it did not intend nor contemplate. The bankrupt having the power to make himself the beneficiary would have the supreme control and could defeat the statute as well as the wife and relatives, if it intended to benefit them. To expand public policy to the

extent of the Hammel case is not warranted by either the language employed in the proviso nor by any inference therefrom.

The bankrupt himself was left to provide for his family by designating them beenficiaries, contingent on divorce, separation or death, but waiving his right to change beneficiaries, which would have given them a vested interest, instead of a mere expectancy or contingency, subject to his whim or will, which, while he retains such power is equivalent to a provision for his own benefit whenever he chose to make himself the beneficiary before bankruptcy or after his discharge therefrom.

And again, if the trustee could have obtained the loan value of the policy, as indicated by the court, *a fortiori* why can he not obtain its surrender value, the very thing the proviso explicitly authorizes him to have. Furthermore, both surrender and loan value are derived from the same source, the full reserve of the policies after three years' premiums have been paid, and they are indifferently and interchangeably called by either of these names by the insurance companies to denote the VALUE of policies at a given date the amount being the same in most of them or differing only slightly.

The court in Hiscock v. Mertens, 205 U. S., 202, decided that the phrase "Cash surrender value" has no technical meaning and is understood to mean value. In Everett v. Judson, supra, there was a surrender value and it was directed to be paid to the trustee.

IV.

By usage or custom the cash surrender value of these policies, before lapse, is payable to the insured and not to any designated beneficiary.

This point was settled by the case of Hiscock v. Mertens, supra, which was approved in Burlingham v. Crouse, supra, and followed in Matter of Flanigan, 228 Fed. Rep., 339, and we respectfully call attention to the letters from the insurance companies printed on pages 61-69, 70-79 of the Transcript of Record, which show the practical working of the usage or custom of the insurance companies and that they require only a legal surrender of the policies, whether made by the bankrupt or the trustee or whoever may have the legal right to the surrender value.

V.

These policies are not exempt under the Laws of the State of New York.

We respectfully refer the court to the Domestic Relations Law, of the State of New York, Section 52, and the following decisions thereon:

Lowenstein v. Koch, 165 App. Div., 760;
Lauterbach v. N. Y. Inv. Co., 62 Misc., 561, 565;
Jacobs v. Strumwasser, 84 Misc., 28;
Cavagnavo v. Thompson, 78 Misc., 687, 688;
Clark v. Shaw, 91 Misc., 245, 247;

also

In re Wolfe, 165 Fed., 984.
Matter of White, 174 Fed. Rep., 333.

VI.

It is respectfully submitted that the ends of justice will be attained by an order of this Court permitting the review of this case by Writ of Certiorari and commanding that all the proceedings in the Circuit Court of Appeals for the Second Circuit and of the District Court for the Southern District of New York shall be brought here for consideration.

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3

Supreme Court of the United States

OCTOBER TERM—1916.

No. [redacted] 359

SAMUEL C. COHEN, as Trustee in Bankruptcy of Elias W. Samuels, Bankrupt,
Petitioner,

against

ELIAS W. SAMUELS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

IRVING L. ERNST,
170 Broadway,
Borough of Manhattan,
New York City.

SAMUEL STURTZ,
of Counsel.

Supreme Court of the United States

SAMUEL C. COHEN, as Trustee in Bankruptcy of Elias W. Samuels, bankrupt,
Petitioner,

against

ELIAS W. SAMUELS,
Respondent.

RESPONDENT'S BRIEF.

Statement.

The question for consideration in opposition to the application for a writ of certiorari is as follows: Did the Circuit Court of Appeals for the Second Circuit properly determine this question—where, in a life insurance policy upon a bankrupt's life, the beneficiary is the wife or some third person and the right to change the beneficiary is reserved, that the bankrupt cannot be compelled to change the beneficiary to himself, and the Trustee in Bankruptcy does not become vested with the right to claim the cash surrender value by himself exercising the power reserved?

The policy of the Mutual Life Insurance Company, at its issuance, June 24th, 1905, was payable

to the bankrupt (fol. 186, page 62, Transcript of Record), and on February 6th, 1905, the bankrupt changed the beneficiary to his mother (fol. 189, Transcript of Record). His mother having died on May 10th, 1908 (fol. 115, Transcript of Record), he subsequently (May 10th, 1910) changed the beneficiary to his sister (fol. 191, Transcript of Record) and it has remained so ever since. This Company requires the consent of both the assured and beneficiary to the payment of the cash surrender value (fol. 210, Transcript of Record).

The policy of the Equitable Life Assurance Society was issued on December 28th, 1899, payable to the bankrupt's mother (fol. 213, Transcript of Record). She having died, the beneficiary was changed to the bankrupt's sister on July 6th, 1911 (fol. 234, Transcript of Record), and it has remained so ever since. *This policy provides that a surrender value only arises in case of a lapse* (fol. 221, Transcript of Record). No lapse occurred at the time when the petition was filed, and it appears to be the rule of the Company not to allow cash surrender values prior to lapse, but that if prior payments were to be made, they would require in addition to the assured's release a release from the existing beneficiary (fol. 237, Transcript of Record).

The policy of the Penn. Mutual Life Insurance Co. was issued May 1st, 1909 (fol. 154, Transcript of Record), payable to the bankrupt's brothers, and was subsequently (March 2nd, 1915) changed and made payable to the bankrupt's sister and niece (fol. 150, Transcript of Record). The provisions of this policy as to cash surrender values are contained on page 55, folios 163-165, Transcript of Record.

POINT I.

The cash surrender values were no part of the bankrupt's estate at the time when the petition in bankruptcy was filed.

The Trustee's brief argues from the standpoint that as none of these policies had been assigned to the designated beneficiaries, thus placing it beyond the power of the assured to change a beneficiary, the beneficiaries have no vested interest in these policies. That such an assigned policy, irrevocable by the assured, is the only one which secures to the assured's wife and children or designated beneficiary the provision for their future; that where a policy reserves the right in the assured to change the beneficiary, it is not the kind of a policy which makes a permanent provision for the designated beneficiaries, be they the wife, children or other relatives, and that the only way to procure that permanent provision is by having the policy assigned to the beneficiary. That the Trustee could change the beneficiary to himself as such, or to the bankrupt's estate and obtain the surrender value.

Section 70a-5 of the Bankruptcy Act provides:

> "* * * Provided that when a bankrupt "shall have any insurance policy which has a "cash surrender value *payable to himself, his "estate or personal representatives,* he may "* * * pay or secure to the trustee the sum "so ascertained. * * *"

Until the decision of the Supreme Court of the United States,

Burlingham vs. Crouse, 228 U. S., 459,

different views were taken by the Referees and the Courts as to the construction of this provision. This case settled the question so long undecided and held that the trustee was entitled only to *that sum which was available to the bankrupt at the time of the bankruptcy as a cash asset, or otherwise the benefit of the policy was left to the insured.*

At page 467 the Court said:

> "Subdivision 5 undertakes to vest in the "trustee property which, prior to the filing of "the petition, the bankrupt could by any means "have transferred or which might have been "levied upon or sold under judicial process "against him. • • •"

Then, in the opinion, follows the proviso with reference to insurance policies having a cash surrender value, and the Court then said, at page 472:

> "Congress recognized also that many policies "at the time of the bankruptcy might have a "very considerable present value which a bank-"rupt could realize by surrendering his policy "to the Company. We think it was this latter "sum that the Act intended to secure to cred-"itors by requiring its payment to the trustee "as a condition of keeping the policy alive. In "passing this statute, Congress intended, while "exacting this much, that when that sum was "realized to the estate, the bankrupt should be "permitted to retain the insurance which, be-"cause of advancing years or declining health, "it might be impossible for him to replace. It

"is the twofold purpose of the Bankruptcy Act "to convert the estate of the bankrupt into "cash and distribute it among creditors and "then to give the bankrupt a fresh start with "such exemptions and rights as the Statute "left untouched. In the light of this policy, "the act must be construed. We think it was "the purpose of Congress to pass to the trus-"tee the sum which was available to the bank-"rupt at the time of the bankruptcy as a cash "asset, otherwise to leave to the insured the "benefit of his life insurance."

Now what does this mean? It means that the trustee was entitled to the surrender value which was available to the *bankrupt's estate*. In the Burlingham case the policy was made *payable to the bankrupt's estate* and the question arose whether the trustee was entitled to the entire amount of the insurance policy, since the bankrupt died after adjudication, and that decision held that he was only entitled to the cash value which existed at the time when the petition was filed, and the balance of the policy went to the bankrupt's executor. *That policy was payable direct to the bankrupt's estate and not to any designated beneficiary.* It was the bankrupt's policy; his own property in which no one else was interested. The argument in the trustee's brief that the absolute property right in these policies was in the insured and not in the beneficiaries is not so. The fact that some policies and the rules of the company provide for the assent of the beneficiary to obtain the surrender value in itself shows that these beneficiaries had some interest in these policies of which they could not be deprived. How then can the

Court substitute the trustee for the bankrupt, so that he may surrender the policy and obtain its cash value? The rule of the company or condition in the policy requiring the assent of the beneficiary is a just one. If the trustee is substituted and demands of the company the cash value which it refuses because of the lack of consent of the beneficiary, could the Court, under fear of imprisonment, compel the beneficiary to assent? We do not think that the Court has any such power.

It has been held in many cases that in the case of co-operative associations, the beneficiary had no vested interest in the insurance where the member possessed an option to change the beneficiary at his pleasure without the consent of the beneficiary named in the policy, and in the State of New York the right to make such change is provided for in the Insurance Law, and consequently the insured's benefit is regarded as attached to the membership and not to the beneficiary named.

Insurance Laws of New York, Consolidated Laws, Article 6, Section 211;
Steinhausen vs. Preferred Mutual Accident Association, 59 Hun, 336, 339;
Smith vs. National Benefit Society, 123 N. Y., 85, 88.

In other words, the right of indemnity does not arise upon contract, but is a mere feature of the membership and cannot be disconnected therefrom. The certificate is not a chose in action like an ordinary policy of life insurance in which a right of property may vest, and the only right of the member is to exercise a power of appointment over the same.

In the matter at bar the policies are entirely unlike that of co-operative insurance to which the above rule may apply. The policies of insurance in the matter at bar are not a membership benefit, but a contract obligation.

> Washington Central Bank vs. Hume, 128 U. S., 205.

These policies at the time when the petition in bankruptcy was filed were payable to designated beneficiaries who happened to be relatives of the bankrupt, and though the policies gave the right to the bankrupt to change the beneficiaries without their consent, yet this means nothing more than that a right upon his part to terminate the security he had provided for the beneficiaries. Naturally, if he dies in the meantime, before making such change, the beneficiaries are entitled to the amount of the policy. It is inconceivable to see how the trustee claims that the beneficiaries have no interest in the policy when they have a right to collect the insurance money upon the death of the assured. The beneficiaries possessed either a vested interest in the policy or had merely an expectancy, and how can it be claimed that the mere right to terminate a contract operates to make its obligations a mere expectancy only? It is true that the beneficiaries' rights may be terminated by the action of the assured, but does that create any expectancy or make the interest of the beneficiaries a mere contingency? The rights of the beneficiaries are contract rights and are vested and complete and the power of the assured to terminate the same by change of beneficiary is a mere conditional limitation which, when exercised, terminated their

rights, but does not make their interest in the policy any the less of a vested nature. *Unless the policy is payable to the insured or has a surrender value payable by its terms to him alone, he has no interest that passes to the trustee.*

Matter of Buelow, 98 Fed. Rep., 87;
Matter of McDonald, 101 Fed. Rep., 239.

A policy that does not assure to the bankrupt some actual value as an asset does not pass to the trustee.

Gould vs. New York Life Insurance Co., 132 Fed. Rep., 927;
Clark vs. Equitable Life Assurance Society, 143 Fed. Rep., 175.

As to the policies of the Mutual Life Insurance Company and Equitable Life Assurance Society, the record shows that the surrender values are not payable except with the consent of the beneficiary. Such consent is necessary, as, before payment is made, the policy and all claims thereunder must be surrendered to the company. A surrender by the assured without the consent of the beneficiary would be invalid and void.

Whitehead vs. New York Life Insurance Co., 102 N. Y., 144;
Schneider vs. United States Life Insurance Co., 123 N. Y., 109;
Garner vs. Germania Life Insurance Co., 110 N. Y., 267.

The most that can be claimed is that the assured had a right to terminate the interest of the bene-

ficiaries by making a change, but assuming that he had such right to change the beneficiary, that would not give him any interest in the policy at the time when the petition was filed and which would pass to the trustee, as the policies did not mature at the commencement of the bankruptcy proceedings and hence there was nothing for the trustee to receive.

The Circuit Court of Appeals for the Second Circuit passed upon that question in the case of

In re Hammel, 34 Amer. B. R., 46.

In that case the policy upon the bankrupt's life was made payable to his wife. It had no cash surrender value, but did have a loan value, and policy provided that the insured might change the beneficiary at any time. The matter came before the same Referee before whom these applications were heard, and he held that the bankrupt could not be compelled to change the beneficiary to himself so as to obtain the loan thereon and pay it to the trustee. The Referee's decision was reversed by the District Court, but sustained by the Circuit Court of Appeals. In the opinion written by Lacombe, Ch. J., the Court refers to the Burlingham vs. Crouse case and cited that portion of the opinion of the Burlingham vs. Crouse case which says:

> "True it is that life insurance policies are "a species of property and might be held to "pass under the general terms of subdivision "5, section 70a, but as a proviso dealing with "a class of this property was inserted and "must be given its due weight in construing "the policy."

It is true that the Hammel case had reference to loan value, but the Court said:

> "The contention is that the insured could, "under the power reserved in the contract with "the Insurance Company, cancel the original "designation of the beneficiary and substitute "himself or his estate, should then obtain the "loan from the company and turn it over pos- "sibly to the trustee if the designation were "changed to the insured's estate. * * * "Twelve years ago the bankrupt took out this "policy for the benefit of his wife so as to se- "cure to her $3,000 in the event of his death. "This was a laudable and proper thing to do, "Public policy insures the making of such pro- "visions for an uncertain future. The policy "contains a clause authorizing the insured to "change his beneficiary, a perfectly proper "clause, she might predecease him or desert "him or become unfaithful. There is nothing "to suggest any such reason for making the "change. On the contrary, the presumption "is that now, when he is a bankrupt and his "death in the near future would, except for "this insurance, possibly leave her in poverty, "he would not voluntarily cancel his designa- "tion or her as beneficiary. It cannot be as- "sumed that, of his own mind, he would take "away from her the small sum which the bene- "ficial system of life insurance and his own "savings during twelve years have made it pos- "sible to secure to her as a last resort should "he die and leaving nothing behind him. The "proposition that he should be constrained "against his will by an order enforceable by

"imprisonment in the event of disobedience to "deprive his wife of her present interest in the "policy, to make himself the beneficiary, to bor- "row two-thirds of the $3,000 from the com- "pany, and turn it over to his creditors and "then to make her again the beneficiary of the "remaining one-third seems contrary to public "policy and to good morals. We are unwilling "to give this effect to the statute unless con- "strained to do so, either by its language or "by controlling authority. Since we are not "satisfied that Burlingham vs. Crouse requires "such disposition of the question presented, the "order of the District Court is reversed."

The following cases were decided by the United States Supreme Court at the same time as Burlingham vs. Crouse case. Reference is made to them because upon examination it will be found that *the policies were made payable to the bankrupt's estate*, and these cases also referred to the Burlingham case.

Everett vs. Judson, 228 U. S., 474;
Andrews vs. Partridge, 228 U. S., 479.

The following case construes the Burlingham vs. Crouse case and has a state of facts similar to those at bar.

Matter of Lyon, 32 Amer. B. R., 483.

In this case the Court held, *the cash surrender value of an insurance policy on the life of a bankrupt passes to the trustee and not the policy of insurance itself.* That the only cash surrender value

that passes to a trustee is the cash surrender value *payable to the bankrupt himself, his estate or personal representatives.* Hence, where a cash surrender value of a policy on the life of a bankrupt is only payable upon the joint consent of the bankrupt and beneficiary, his wife, it is not an asset passing to the trustee in bankruptcy. At page 486, the Court said:

> "Prior to the decision of the Supreme Court "in the case of Burlingham vs. Crouse there "was much doubt as to the rights of the in- "sured and beneficiaries under policies having "a cash surrender value, and containing a ben- "eficiary other than the insured and reserving "the right to change the beneficiary in the in- "sured. As is pointed out in Burlingham vs. "Crouse aforesaid, different views were taken "of Section 70 (5) of the Bankruptcy Act, and "conclusions irreconcilably different were "reached by the courts in accordance with the "view of said section of the Bankruptcy Act "adopted.
>
> "It appears to be established in Burlingham "vs. Crouse, that the proviso contained in Sec- "tion 70 (5) though in form usually employed "to limit the general terms immediately pre- "ceding it, is not to be so construed, but is to "be regarded as additional legislation, and that "by said additional legislation it is only the "cash surrender value of the policies having "such cash surrender value payable to the "bankrupt, his estate or personal representa- "tives, that passes in the first instance to the "trustee subject to redemption by the bank-

"rupt, and that the policy does not pass to "said trustee until the bankrupt has failed to "redeem it. * * *

"(Page 487.) In the opinion of the Referee, "the only cash surrender value that passes to "the trustee is the cash surrender value pay- "able to the bankrupt, 'himself, his estate or 'personal representatives.' In each of the "policies, the cash surrender value can only "be obtained according to the custom of the "company on a receipt of the bankrupt and "beneficiary. It is argued, that because the "beneficiary is the wife of the bankrupt, and "that she in all probabilities would not refuse "her signature to the payment of the cash sur- "render value to her husband, therefore, this "provision of the policy requiring her consent "should be disregarded, and the policy be con- "strued as if the cash surrender value was "payable solely to the bankrupt himself. The "Referee cannot accept this view. The custom "of the company in requiring the consent of "the beneficiary is, it seems to the Referee a "perfectly lawful requirement, and binding on "the bankrupt and therefore upon his trustee. "It confers some rights upon the beneficiary, "the wife of the bankrupt." Affirmed by the District Court.

Matter of Young, 31 Amer. B. R., 29.

This case held that under the provisions of Sections 6 and 70 (a) policies made payable to the bankrupt's wife wherein he expressly retains the right to change the beneficiary at any time, without her consent, and is granted the right to receive

at his sole option at any time the stipulated surrender value, the policies having a cash surrender value at certain periods which may be taken by the bankrupt without the consent of the beneficiary, cannot be sold by the trustee in bankruptcy for the benefit of creditors.

Matter of Churchill, 31 Amer. B. R., 1.

In this case the policy was payable to the wife of the bankrupt, or in the event of her prior death to the insured's estate, and the Court held that the cash surrender value did not pass to the trustee and refers to the Burlingham vs. Crouse case.

Matter of Pfaffinger, 21 Amer. B. R., 255.

Where a policy of life insurance, upon a husband's life is payable to his wife, but under the contract he may, with the consent of the insurance company, change the beneficiary, the policy does not pass to his trustee in bankruptcy and the fact that after his adjudication he applied in his own name for the surrender value of the policy, which was not paid to him, does not affect the rights of the wife thereunder.

Re Hugo Lange, 1 Amer. B. R., 189;
Re Joseph Hernich, 1 Amer. B. R., 713.

Two of the policies, viz., the Equitable and Mutual, require the written assent of the beneficiary to the payment of the cash surrender value. Irrespective, however, as to whether the assent of the beneficiary is required or not, the bankrupt claims that under the authorities construing the

statute, he cannot be compelled to change the beneficiary to himself so as to secure the surrender value to the trustee. The beneficiaries cannot be compelled to give up their interest in the policies. At the time when the petition was filed, there was no cash surrender value due upon any of the policies as they were not payable to *the bankrupt or his estate.*

Under the Hammel case, the bankrupt cannot be forced to change the beneficiary to himself so as to satisfy the wishes of the trustee; furthermore as there was no cash surrender value payable to the *bankrupt or his estate* when the petition was filed, in accordance with the decision in the Burlingham vs. Crouse case, it is contended that there was no cash surrender value in existence at the time when the petition was filed that in itself passed to the Trustee as an asset. These beneficiaries have been such for some time and it is improbable to believe that the bankrupt will change them when the policies are now made payable to immediate relatives of the bankrupt. Did Congress intend that where policies are payable to designated beneficiaries (immediate relatives) if the bankrupt died after bankruptcy they should be left paupers?

As Judge Lacombe said in the Hammel case:

> "It seems contrary to public policy and to "good morals. We are unwilling to give this "effect to the statute unless constrained to do "so, either by its language or by controlling "authority."

The Statute, Section 70-a, Subdivision 5, must be construed in the light of the intention of Congress in passing the law. It distinctly provides for the

cash surrender value which is payable to the bankrupt or his estate. If Congress had intended to include all life insurance policies which had a surrender value, it could have so provided that when a bankrupt shall have any insurance policy which has a cash surrender value it may be paid to the trustee, and the words "payable to himself, his estate or personal representatives" could have been omitted. There was an intent on the part of Congress in inserting these words, to limit the trustee to receive the surrender value from those policies which were the *property of the bankrupt* at the time when the petition was filed; and evidently did not consider that policies upon the life of a bankrupt, payable to designated beneficiaries, were the property of the bankrupt. If it had thought so, those words could have been eliminated and the proviso would have covered every policy upon the life of the assured, irrespective as to who the beneficiary might be. The proviso was inserted for the beneficent purpose of protecting the bankrupt who might be unable to obtain other insurance because of advanced years. As the Court said in the Burlingham vs. Crouse case:

> "In passing this statute, Congress intended "while exacting this much that when that sum "(meaning surrender value) was realized to "the estate, the bankrupt should be permitted "to retain the insurance which, because of ad-"vancing years or declining health, it might be "impossible for him to replace."

In the Trustee's brief, it says at page 21:

> "* * * The policies and the power which he "did not exercise for his own benefit are his

"property and the title therein vests in the "trustee by operation of law, except so far as "limited by the proviso contained in section "70a subdivision 5. Hence the trustee had "power to substitute himself or his estate as "beneficiary in place of those designated and "the policies should pass to the trustee as as-"sets, unless their surrender value is paid or "secured to him by the bankrupt."

This proposition is not correct. *The title to the policies would not vest in the trustee.* All he would be entitled to would be the interest of the bankrupt in the surrender value (if any), which existed at the time when the petition was filed.

The Circuit Court of Appeals in its opinion said:

"The question is one of the construction of "this proviso in the statute."

It certainly does not require any amount of study to ascertain the meaning of the proviso. It is plain and concise and was rightly construed by the Circuit Court of Appeals.

POINT II.

It is respectfully submitted that the decision of the Circuit Court of Appeals is correct, and the application for a writ of certiorari should be denied.

IRVING L. ERNST,
Attorney for Respondent,
170 Broadway, New York City.

SAMUEL STURTZ,
of Counsel.

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1916.

No. 855 1359

SAMUEL C. COHEN, AS TRUSTEE IN BANKRUPTCY, OF ELIAS W. SAMUELS, BANKRUPT,
PETITIONER,

AGAINST

ELIAS W. SAMUELS,
RESPONDENT.

MOTION FOR A RE-HEARING.

LAWRENCE B. COHEN,
Attorney for Petitioner.

In The Supreme Court Of The United States

OCTOBER TERM, 1916.

No. 855

SAMUEL C. COHEN, AS TRUSTEE IN BANKRUPTCY, OF ELIAS W. SAMUELS, BANKRUPT,
PETITIONER,

AGAINST

ELIAS W. SAMUELS,
RESPONDENT.

MOTION FOR A RE-HEARING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays that this Honorable Court will reconsider its action denying his application for a Writ of Certiorari, and grant the same for the following reasons:

I. The interpretation of Section 70 A (5), of the Bankruptcy Act by the only two Circuit Courts of Appeal that have passed on the question, has led to two irreconcilable and diametrically opposed conclusions. In *Malone* v. *Cohn,* reported in 38 A. B. R., 87, the Circuit Court of Appeals, Fifth Circuit, relying upon the decision of this Court in *Burlingham* v. *Crouse,* 288 U. S. 459, held that the surrender value of insurance policies in existence at the time of the filing of the petition in bankruptcy against the insured, passed to the trustee. In *Cohen* v. *Samuels,* reported in 38 A. B. R., 257, the Circuit Court of Appeals, Second Circuit, relying upon the decision of this Court in *Burlingham* v. *Crouse,* 228 U. S., 459, held that the surrender value of insurance policies in existence at the time of the filing of the petition in bankruptcy against the insured, did *not* pass to the trustee. In the latter case Hough, J., dissented upon the theory of the doctrine enunciated by this Court in the *Burlingham* v. *Crouse* case, *supra.* Thus upon the same statement of facts, two Circuit Courts of Appeal in two different jurisdictions, both relying upon a single decision of this Court, have definitely aligned themselves on opposing sides by announcing conflicting interpretations of the law as proclaimed by this Court. In both cases applications were made to this Court for writs of certiorari. Both applications were denied. Both decisions cannot be right; one must be erroneous. Unless and until this Court places a definite interpretation on the aforementioned Section of the Bankruptcy Act, creditors in different jurisdictions will receive

greater or less protection, depending upon the conflicting interpretations advanced by the District or Circuit Courts in the particular jurisdiction. Such a condition is contrary to and in violation of the fundamental principle underlying Federal statutes, in that it tolerates and countenances a non-uniform enforcement of our law, favoring creditors in particular jurisdictions and discriminating against creditors in other localities.

II. Unless and until this Court decides definitely how the Bankruptcy Act, Section 70, A (5) applies to life insurance policies having a surrender value at the time of adjudication of bankruptcy, in which the beneficiary's name may be changed at and by the will of the insured bankrupt, there cannot be any uniform enforcement of that law, because it is held by some Circuit Courts of Appeal and by some District Courts of the United States that the said act does apply to such life insurance policies, in so far that their surrender value passes to the trustee in bankruptcy, while in other District Courts the contrary is held.

III. It was not the intent of Congress to enact legislation permitting an insolvent debtor to create an impregnable fund as against his lawful creditors by effecting life insurance, naming a third party as beneficiary thereof, and reserving to himself the right to change the beneficiary at will. The beneficiary in such case has at most a contingent interest and the insured a general

power of appointment. This power has been uniformly construed as property in the hands of the donee. Such property should pass to the trustee in bankruptcy and the intent and purpose of the proviso incorporated in Section 70, A (5) of the Bankruptcy Law are maintained inviolate, by permitting the bankrupt or those interested to continue the policy. The trustee receives merely its value at the time of the filing of the petition in bankruptcy. This surrender value is not exempt from the lawful claims of creditors. It cannot be assumed that Congress intended to deprive a creditor of access to and of the benefit of all the nonexempt assets in the bankrupt's possession or under his control and belonging to him at the time he was adjudged a bankrupt. Nor can it be assumed that Congress intended to create a method whereby an insolvent debtor could make immune to the demands of creditors non-exempt assets belonging to said debtor or under his control during the period of his said bankruptcy, to be again used and the benefits thereof enjoyed by him after his discharge from his bankruptcy.

IV. Congress never intended to reserve to a bankrupt non-exempt assets belonging to him or under his control or over which he had a general power of appointment at the time of his adjudication as a bankrupt. To hold otherwise would constitute the violation of plain, concise and forceful legislative intent and the complete disregard of the entire purpose of the Bankruptcy Act passed for the sole purpose of protecting the rights of creditors.

V. No ruling should permit a bankrupt by a mere choice of words to defeat the claims of his just and lawful creditors, and allow the said bankrupt to reserve to himself and for his own use non-exempt assets under his control which rightfully and in all justice belong to the said creditors.

I know this Court never decides any question without due deliberation and I also know that after having given a question due consideration, it is not probable that any reason so controlling as to induce a reversal of its judgment can be advanced on a motion for a re-hearing. But since the time the application for a writ of certiorari was made to this Court, the decision in *Malone* v. *Cohn,* in the Circuit Court of Appeals, Fifth Circuit, *supra,* has come down adding to the increasing and perplexing confusion and chaos, obtaining generally throughout the country. I venture to believe, therefore, that a decision on the question as to the extent the "Bankruptcy Act, Section 70, A (5)" applies to life insurance policies having a cash surrender value with a right in the insured to name or change at will the beneficiaries of such policies, is so important as to justify me in urging upon this Court a second time to grant this petition for a writ of certiorari.

In no way except through the judgment of this Court, can the doubt which exists in the minds of the bar or the differences which exist among the judges be removed. With the decision by this Court, whether it shall be one way or the other, the law will be uniformly and impartially en-

forced in every jurisdiction. Our system will be rescued from the incongruity that what assets of a bankrupt debtor are attachable by creditors in one district, may not be attached in an adjoining district. With the question authoritatively decided by this Court, then the benefits and exemptions and penalties of the law will be understood and applied in all places, to all men alike. Surely to accomplish such result is a sufficient reason for granting this petition for a writ of certiorari.

Respectfully submitted,

LAWRENCE B. COHEN,
Attorney for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

SAMUEL C. COHEN, as Trustee in Bankruptcy of Elias W. Samuels, Bankrupt,
Petitioner,

against

ELIAS W. SAMUELS,
Respondent.

No. [redacted] 359

Motion to Advance Cause for Hearing

LAWRENCE B. COHEN,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

SAMUEL C. COHEN, as Trustee in Bankruptcy of Elias W. Samuels, Bankrupt, Petitioner, *against* ELIAS W. SAMUELS, Respondent.	No. 855.

MOTION TO ADVANCE CAUSE FOR HEARING.

Now comes Samuel C. Cohen, as Trustee in Bankruptcy of Elias W. Samuels, Bankrupt, petitioner, by his attorney of record, and moves this Honorable Court to advance this cause for hearing; and for grounds hereof petitioner herein says:

1. This is an appeal by petitioner who is the trustee in bankruptcy of Elias W. Samuels, bankrupt. Elias W. Samuels filed a voluntary petition in bankruptcy on May 13, 1915, and was adjudicated a bankrupt on that day. Your petitioner was elected trustee in bankruptcy. The bankrupt held five life insurance policies on his own life written by various companies. Your petitioner

brought on motions before the Referee in Bankruptcy to require the bankrupt to turn over to him certain policies, or in the alternative to secure to him their surrender value as of the date of adjudication. The motions were denied. The United States District Court for the Southern District of New York affirmed the orders of the Referee. An appeal was taken to the United States Circuit Court of Appeals for the Second Circuit and the decrees were affirmed. An order for a review was made to this Court and denied and upon an application for a re-hearing, the order denying the writ was vacated and the writ of certiorari was allowed. The matter is now in this Court for a hearing on the merits.

2. The trustee in bankruptcy being the petitioner, it is submitted that this cause should be advanced for hearing because the estate in bankruptcy should be speedily wound up and disposed of. The proceeding has been pending in the bankruptcy court for more than two years and cannot be closed until the appeal in this matter is disposed of. This is the only matter that prevents and delays the winding up of the estate. At the time the writ of certiorari was allowed, a writ was also allowed in the case of Cohn, as Trustee, v. Malone (No. 852), pending in the United States Circuit Court of Appeals for the Fifth Circuit. That case and the present case are appeals from the same question, each decided differently. It is a matter of public interest to have this insurance question settled decisively and speedily.

LAWRENCE B. COHEN,
Attorney of Record for Petitioner.

Notice of Motion.

The respondent is hereby notified that the petitioner will, on the 4th day of June, 1917, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as a hearing may be had, submit for the consideration of said Court the foregoing motion.

LAWRENCE B. COHEN,
Attorney of Record for Petitioner.

Copy of the foregoing motion and notice in support thereof received this 7 4 2 day of May, 1917.

SAMUEL STURTZ,
Attorney of Record for Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 359.

SAMUEL C. COHEN, as Trustee in Bankruptcy of ELIAS W. SAMUELS, Bankrupt,

Petitioner.

VS.

ELIAS W. SAMUELS,

Bankrupt.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF OF TRUSTEE

LAWRENCE B. COHEN,
Solicitor for Petitioner Samuel C. Cohen.

LAWRENCE B. COHEN and
ADOLPH BOSKOWITZ,
of Counsel.

EBERT PRESS, 46 VESEY STREET N. Y. TEL. 7554 CORTLAND.

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CITATIONS.

IN THE

Supreme Court of the United States

SAMUEL C. COHEN, as trustee in Bankruptcy of ELIAS W. SAMUELS, Bankrupt Appellant, AGAINST ELIAS W. SAMUELS, Appellee.	October Term 1917. No. 359.

BRIEF FOR APPELLANT.

Statement of the Case.

This is an appeal from a decree of the United States Circuit Court of Appeals for the Second Circuit which affirmed an order of the District Court for the Southern District of New York, affirming an order of the Referee in Bankruptcy.

On September 16, 1915, motions made by the trustee in bankruptcy before the referee in bankruptcy were heard, requiring the bankrupt to deliver to the trustee certain policies of insurance upon the life of the bankrupt or in the alternative that the bankrupt pay to the trustee the cash surrender value thereof as of the date of adjudication of the bankrupt, in which event he might retain the policies, as provided by the Bankruptcy Act (p. 17 fol. 34).

The referee in bankruptcy denied the motions of the trustee and entered an order to that effect on December 30, 1915 (pp. 5-7).

Thereafter on January 18, 1916 the trustee in bankruptcy filed petitions to review the rulings and order of said referee, before the United States District Court for the Southern District of New York, which Court by its decree affirmed the order of said referee and entered its order to that effect on March 7, 1916 (pp. 3-4, 17).

Thereafter on March 17, 1916, the trustee in bankruptcy appealed to the Circuit Court of Appeals for the Second Circuit from the decree and order of the District Court (pp. 1-2).

The Circuit Court affirmed the decree of the District Court on November 14, 1916 and entered an order to that effect on November 24, 1916 (pp. 55-57, 58), Hough, J. rendering a dissenting opinion (pp. 57-58).

This appeal from the Circuit Court of Appeals is brought into this Court (pp. 59-60).

Statement of Facts.

On May 13, 1915, Elias W. Samuels, Appellee, filed a voluntary petition and was adjudicated a bankrupt on said day. Samuel C. Cohen, appellant, was thereafter duly elected trustee in bankruptcy of said bankrupt. and duly qualified, and is still acting as such trustee.

Life Insurance Policies Involved.

Five life insurance policies written by various life insurance companies were held by the said bankrupt at the time of his adjudication in bankruptcy.

The three insurance policies concerning which the Trustee, appellant herein, made application to the Referee in Bankruptcy, are as follows:

1. The policy of the bankrupt in the Penn. Mutual Life Insurance Company, No. 508109, for the sum of $3,000., was originally payable to himself but he substituted the present beneficiaries (p. 28 fol. 50) payable one-half to the bankrupt's niece, Louise Marie Samuels. and one-half to the bankrupt's sister, Mary Caruthers.

and which policy has a cash surrender value of about $193.85 (fol. 10). *This policy provides that the bankrupt reserves the right to change the beneficiary, and has the absolute right to do so without the consent of the beneficiary.*

2. The policy in the Mutual Life Insurance Company No. 1607555, for the sum of $3,000. was originally payable to the bankrupt, thereafter he substituted his mother as beneficiary and *after her death* he substituted his sister Hattie Browd, as beneficiary (p. 42-43 fol. 64.) This policy has a cash surrender value of $753 (fol. 11) subject to the deduction of a loan of $555. and interest. *This policy provides that the bankrupt reserves the right to change the beneficary, and the bankrupt has the absolute right to do so without the consent of the beneficiary.*

3. The policy in the Equitable Life Assurance Society, No. 914014, for the sum of $1,000. was originally payable to the bankrupt's mother and *after her death* he substituted his sister, Hattie Browd, as beneficiary (p. 47 fol. 71; pp. 52-53 fol. 78). This policy has a cash surrender value of $396. (fol. 12). *This policy provides that the bankrupt reserves the right to change the beneficiary and has the absolute right to do so without the consent of the beneficiary.*

The terms and conditions of these policies material to the case at bar are herewith set forth:

The Penn Mutual Life Insurance Co. policy at page 29, folio 51, and page 31 fol. 55, reads as follows:

> "The right of revocation is reserved by the insured. When the right has been reserved, the insured shall have full power while this policy is in force (subject to any previous assignment) to change the present beneficiary or beneficiaries."
>
> * * * * * * * * *
>
> "Nonforfeiture" * * * "At the end of the third and succeeding years the cash value is the full reserve. This non-forfeiture value shall be se-

cured to the owner of the policy through one of the following provisions."

"Third: The payment of the Cash surrender value provided for below on surrender of the policy and all claims hereunder to the company within one month from the date of lapse."

The table printed on page 32 shows the cash surrender value in May, 1915, was about $193.85 after deducting the loan. Found by Referee (fols. 10, 12).

The Mutual Life Insurance Co. policy at page 42, folio 64 and page 44, folio 66, reads as follows:

"Change of Beneficiary. The insured may, from time to time during the continuance of this policy change the beneficiary or beneficiaries by written notice accompanied by this policy." * * *

"Cash Surrender Value. After three full years' premiums have been paid upon legal surrender of this policy, provided surrender be made." * * *

(1) "Within sixty days after the non-payment of any subsequent premium on its original due date." * * *

(2) * * * " the company will pay therefor, within sixty days from the date of surrender, the amount provided for in the Table of Guarantees."

* * * * * * * * * *

The table printed between pages 40 and 41 shows the cash surrender value in May, 1915, was $753, less loan $555. Net value $198. Found by Referee (fols. 11, 12)

The Equitable Life Assurance policy at page 49, folio 74, reads as follows:

"Surrender Values. This policy shall lapse and together with all premiums paid therein, shall forfeit to the Society, on the non-payment of any premiums when due, excepting that upon due surrender of this policy, within six months, provided premiums have been duly paid for at least

> three full years of assurance, the society will give the assured * * * a cash value. * * * at the date of lapse as fixed by the following Table of Surrender Values based on the number of full years premiums that have been paid."

At page 50, fol. 76, the following language occurs:

> "This Policy is issued with the express understanding that the assured may, provided the policy has not been assigned, change the beneficiary or beneficiaries at any time during the continuance of this policy." * * *

The table printed at page 51, shows that the Cash or Surrender Value in May, 1915, was $365. Found by Referee (fols. 12) at $396.

It will be seen from the foregoing that the terms and conditions of these policies are practically identical, and that only the *insurer* and the *insured* are parties to them.

Position of the bankrupt in relation to all these policies is identically the same.

(a) The bankrupt is the assured and has not died (b) has himself made several changes in the original beneficiaries, (c) has the right to change the beneficiaries at will and to make himself the beneficiary (d) the policies are in force, (e) are payable to a niece and two married sisters of the bankrupt, if living, otherwise to the bankrupt's executors, administrators and assigns, (f) constitute property of the bankrupt (g) contain powers which he is free to exercise for his own benefit but has not so exercised (h) could have been transferred before bankruptcy, but were not so transferred (i) could have been assigned before bankruptcy, but were not so assigned (j) are not defaulted upon, (k) have not lapsed (l) date of maturities have not arrived, (m) after payment of three years' premiums immediately have a value and these premiums have been paid (n) that value arises from the excess annual

premiums paid over the annual cost of insurance and with the interest on such excess is termed the full reserve (o) this full reserve constitutes the surrender value and increases from year to year as shown by the tables mentioned, (p) as respectively more than six, nine and fifteen years' premiums have been paid, had a cash surrender value at the date of filing the petition and adjudication (q) according to the usage and custom of the companies this cash surrender value is paid by the insurance companies before or after lapse upon surrender of the policies.

Cash Surrender and Loan Value.

The value of these policies is created by the means described *In Re McKinney*, 15 Fed. Rep. 535 and cited with approval in *Holden* vs. *Stratton*, 198 U. S. 202 and *Hiscock* vs. *Mertens*, 205 U. S. 202.

This value is the full reserve of the policies at any given period after the premiums have been paid for three years. When thereafter there is a lapse or it is desired to anticipate a lapse and to surrender the policies it is then called surrender value, but if it is desired to make a loan, it is then called loan value.

The full reserve of the policies is interchangeably called their surrender or loan value and is either so stated in the policies or is so understood. The sum paid for surrender or the sum loaned is the same with most companies, though a few companies pay somewhat less for surrender than they loan.

The Penn Mutual Life Insurance Co.'s policy reads: "The cash value is the full reserve." (Fol. 55).

"Loans * * * will advance * * * a sum equal to the full reserve" (fol. 54).

Table reads: "Loan or Cash Surrender Value" (fol. 56) and the amount of each is the same.

The Mutual Life Insurance Co.'s Table reads: "Cash and loan values" and the amount of each is the same (between page 40 and 41).

The Equitable Assurance Society's Table reads: "Table of loans and of Surrender value" and has a separate column for "loan" and "cash value" (fol. 76) and the latter is a little less than the former.

When loans are made by the companies, they are made on the sole security of the policies, and though the loans are nominally payable at some future date, as a matter of fact, they need never to be repaid, as the sum loaned never exceeds the full reserve (loan or surrender value), so that the borrower, whether the insured or trustee, incurs only a theoretical liability when taking the loan and signing the loan certificate. The amount of the loan and interest is eventually deducted from the amount due at the maturity or surrender of the policy, or at the death of the insured. Loans are made only during the time policies are in force. The insured before bankruptcy, or the trustee in bankruptcy, obtains the loan by designating himself beneficiary and no release from any designated beneficiary is then required.

The surrender value is obtained either before or after lapse, by the insured before bankruptcy, or by the trustee in bankruptcy, by designating himself the beneficiary and surrendering the policy which is then cancelled, and no release from the prior designated beneficiary is re-required.

By a recognized usage or custom, though contrary to the provision of the policies, the insurance companies pay this cash surrender value *before lapse* as well as after lapse.

Specification of Errors.

The appellant hereby specifies the errors committed by the learned Circuit Court of Appeals in conformity with the following:

Assignment of Errors.

1. Your petitioner (Appellant) was entitled to hold each of the said life insurance policies, unless the bankrupt paid the cash surrender value thereof; (p. 2).

2. That said policies of life insurance are assets belonging to the estate in bankruptcy, and as such pass to the trustee in bankruptcy, pursuant to Section 70a of the Bankruptcy Act, (p. 2).

3. That the bankrupt having reserved a general power of attorney to change the beneficiary without the consent of the beneficiary of each of said policies, the trustee had an interest, and the Bankruptcy Court, has the power to compel the bankrupt to assign such interest in said policies to the trustee (p. 2).

4. That the decree of the United States Circuit Court of Appeals made November 24, 1916, is erroneous, as a matter of law, in affirming and not reversing the decree of the United States District Court for the Southern District of New York made March 7, 1916 affirming the report of the Referee in Bankruptcy made December 30, 1915 denying the trustee's motion to compel the bankrupt to turn over to the trustee certain policies of life insurance or in the alternative to pay to the trustee their surrender value at the date of adjudication of the bankrupt.

POINT I.

Under the Bankruptcy Act. Section 70a. paragraphs 3 and 5. and the proviso thereto:

(a) The title to these policies vests in the Trustee to the extent of collecting their surrender value.

(b) The title to these policies themselves vests in the Trustee, like other non-exempt property of the Bankrupt, unless their surrender value is paid or secured to him.

The first question is whether the right to the cash surrender value of these policies vested in the trustee. If it did, as appellant contends, then it passed by virtue of the Bankruptcy Act, Section 70-a, paragraphs 1, 3 and 5, and the proviso thereto as follows:

> "Title to Property. (a) The trustee of the estate of a bankrupt upon his appointment and qualification,—shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all
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> (1) Documents relating to his property.
>
> (3) Powers which he might have exercised for his own benefit,—
>
> (5) Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. *Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender*

value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings otherwise the policy shall pass to the trustee as assets." (Italics ours.)

The contention of the trustee is in accord with the numerous and well defined interpretations of the application of this section, and its proviso.

(a) These policies being the peculiar property described in the proviso must be dealt with by the trustee as therein prescribed and not as with other non-exempt property of the bankrupt.

This proviso has been construed by the United States Supreme Court as not being an exception, but as additional legislation for the benefit of the bankrupt, prescribing that an insurance policy having a surrender value, payable to himself, his estate or personal representatives, may be redeemed by him at such value, irrespective of its actual value, even if the latter is greater.

In *Holden* vs. *Stratton*, 198 U. S. 202, 213, the Court said:

> "As Section 70a deals only with property, which not being exempt, passes to the trustee, the mission of the proviso was, in the interest of the perpetuation of policies of life insurance, to provide a rule by which, where such policies passed to the trustee because they were not exempt, if they had a surrender value their future operation could be preserved by vesting the bankrupt with the privilege of paying such surrender value, whereby the policy would be withdrawn out of the category of an asset of the estate. That is to say, the purpose of the proviso was to *confer a benefit* upon the insured bankrupt by limiting

> the character of the interest in a non-exempt life insurance policy, which should pass to the trustee, and not cause such a policy when exempt to become an asset of the estate."

This case was cited with approval in *Hiscock* vs. *Mertens*, 205 U. S. 202, 210, and also in *Burlingham* vs. *Crouse*, 228 U. S., 459, 470.

After stating that policies which have a stipulation for surrender value are subject to the same conditions as those which have not such stipulation and that the practice and policies of other companies are the same as those of the Equitable Life Assurance Society, (one of the policies in this case) in *Hiscock vs. Mertens*, 205 U. S. 202, 214 the Court said:

> "Section 70a is broad enough to accommodate such condition. It permits the redemption of a policy by the bankrupt from the claims of creditors by paying or securing to the trustee the cash surrender value of the policy within thirty days after such value has been ascertained and stated to the trustee by the company issuing the same."
>
> * * * * * * *
>
> "It was an actual benefit for which the statute provided and not the manner in which it should be evidenced."

The proviso deals with the subject of life insurance held by the bankrupt which has a surrender value, and the bankrupt may retain the policies only upon payment to the trustee of a sum equivalent to the amount that the company is willing to pay according to custom or stipulation in the policies. (*Burlingham* vs. *Crouse*, 228 U. S. 459, 472.)

> "But most of these policies will be found to have either a stipulated surrender value or an established value, the amount of which the companies are willing to pay and which brings the policy within the terms of the proviso (Hiscock vs.

Mertens, supra) and makes its present value available to the bankrupt estate. * * *

"Congress recognized also that many policies at the time of bankruptcy might have a very considerable present value which a bankrupt could realize by surrendering his policy to the company. We think it was this latter sum that the act intended to secure to creditors by requiring its payment to the trustee as a condition of keeping the policy alive. In passing this statute congress intended, while exacting this much, that when that sum was realized to the estate the bankrupt should be permitted to retain the insurance which, because of advancing years or declining health, it might be impossible for him to replace. It is the twofold purpose of the Bankruptcy Act to convert the estate of the bankrupt into cash and distribute it among creditors and then to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched. In the light of this policy the act must be construed. *We think it was the purpose of Congress to pass to the trustee that sum which was available to the bankrupt at the time of bankruptcy as a cash asset, otherwise to leave to the insured the benefit of his life insurance.*" (Italics ours.)

Burlingham vs. *Crouse*, 228 U. S. 459, 472, 474.

In the U. S. Supreme Court decisions above cited, the usage or custom of the insurance companies to pay the surrender value before lapse is recognized and established, though contrary to the provisions of the policies. Having brushed aside a major technicality the court will not hesitate to deal as effectively with a minor one.

The technicality in these policies, in that they are not payable to the bankrupt "himself, his estate or personal representatives" cannot be so literally construed as to lead to the conclusion that because they do not

answer to the precise description of the proviso they are not covered by it, especially when the trustee under Section 70-a, paragraphs 3 and 5, has the right and power of remedy, so that the full intent of that section may be carried out; otherwise the position of this cash surrender value, although property, is neither available to the bankrupt nor to his trustee, though the former had and the latter has the title thereto, but neither can obtain the value of this property.

Furthermore the surrender value cannot be paid to the bankrupt's estate or personal representatives as these do not come into existence until after his death when the full amount of the policy is paid, while the surrender value is payable to the insured himself during his lifetime, either before or after a lapse of the policy and its surrender. If there is no surrender of the policy during the lifetime of the assured, then what would be surrender value at any time before the maturity of the policy or death of the assured is merged into the total amount of the policy and is paid on the happening of either of these events and the surrender of the policy at that time.

The letters of the insurance companies plainly state that they make these payments of surrender value to any one who has the legal right to surrender these policies.

The Penn Mutual Life Insurance Co., writes:

"Upon full surrender" (fol. 61).

The Mutual Life Insurance Co., writes: "If the policy be legally surrendered." (fol. 70).

"*The insured could, of course, change the beneficiary to himself and then collect the cash value without the consent of the present beneficiary.*" (fol. 71).

The Equitable Life Assurance Society writes: "We would necessarily require in addition to the insured's release, a release from the existing beneficiary." (fol. 79).

For the insured to substitute himself as beneficiary in place of the existing beneficiary, is part of the usage

or custom followed not only by the Mutual Life Assurance Co., but also by the other companies. After such substitution the insured bankrupt can collect the Cash Surrender Value without the consent or release of the existing beneficiary.

The Trustee being vested with the bankrupt's former title, right and power can substitute himself as beneficiary and collect the Cash Surrender Value either from the bankrupt or the company as the proviso prescribes.

It is evident that it is a matter of indifference to the insurance companies as to the person making the surrender of the policies or receiving the money for their Cash Surrender Value, provided only that he have the legal right and power to make full and legal surrender.

The policies show that before bankruptcy, the bankrupt, in whom reposed the title, right and power to reduce to his possession this Cash Surrender Value, failed to do so, and that in consequence of such failure these funds still remain in the custody of the respective insurance companies.

When, however, the bankrupt filed his petition his title to these funds, the right to their possession, the power to make himself the beneficiary of them and to transfer them to himself, vested by operation of law in the trustee.

(b) The policies here in question were the bankrupt's property when the petition was filed and on adjudication, they contain beneficial powers of appointment and are property in the hands of the donee, the bankrupt, available to him, and they are property which he could have transferred. While they are not payable to himself, his estate or personal representatives, he retained the right to make them so payable, until they matured or until his death. Title to these policies in designated beneficaries and contingent interests would have been extinguished by a substitution of the bankrupt himself as the beneficiary.

The bankrupt neither exercised his right under the policies, nor his beneficial power as donee, to designate

himself as beneficiary in place of the persons designated, neither did he transfer the policies though they had a surrender value at the date of filing the petition in bankruptcy. At that time, therefore, they were non exempt property of the bankrupt, the title to which by operation of law, vests in the trustee under the paragraphs and proviso quoted, to be dealt with as therein provided.

The designated beneficaries had neither title to, right in, nor power under these policies prior to, nor have or can they acquire any since the filing of the petition. Their interest therein arises only when the policies mature or at the bankrupt's death, and even then their interest is subject to the amount of the loans payable to the insurance companies and the surrender value at the date of filing the petition, payable to the trustee. Unless this sum is paid or secured to the trustee he has the title and entire interest in these policies as of the date of adjudication.

The only parties interested in this litigation are the trustee and the bankrupt and only their title to these policies, rights in and power under them and the section and paragraphs of the Bankruptcy Act applicable thereto are here for adjudication and as of the date of filing the petition and adjudication.

The bankrupt contends that at the time of filing his petition these policies had no surrender value because they had not lapsed and were not payable to himself, his estate or personal representatives and that therefore the *proviso* in paragraph 5, Sect. 70a does not apply to them, neither do paragraphs 3 and 5, Section 70a (without the proviso) apply and this, notwithstanding that at the time of filing the petition and adjudication, it has been fully shown these policies had a surrender value, before lapse as after lapse, and that the bankrupt retained the right to designate himself the beneficiary and to collect this surrender value.

In other words that because the description in the policies is not identically the same as in the proviso and they did not lapse before filing the petition he need not pay the surrender value to the trustee and yet can

hold these policies free from the claim of his bankruptcy creditors.

If this narrow, technical interpretation were to prevail and these policies are not covered by said Section, 70a because they are not payable to the bankrupt "himself his estate or personal representatives," but, being non-exempt property of the bankrupt which was under his control and dominion and to which he had title at the time of filing his petition and adjudication, not only their surrender value, but the policies themselves would pass to the trustee to be dealt with by him as with other non-exempt property of the bankrupt.

The trustee contends that the policies are non-exempt property of the bankrupt the title whereof vests in the trustee under paragraph 5, Section 70a and that the power also vests in the trustee to designate himself the beneficiary under paragraph 3, Section 70a, so that he has a complete title and can deal with these policies as with other non-exempt property of the bankrupt, unless their surrender value is paid or secured to him.

Futhermore, that if he is not vested with the title to the entire property, these policies, and they are subject to the proviso in paragraph 5, Section 70a, he is vested with the title to the extent of their surrender value and he has the power to designate himself the beneficiary and can collect the same. The only questions at issue are whether the trustee has title to these policies in order to collect their surrender value, or has title to these policies themselves, as non-exempt property of the bankrupt if their surrender value is not paid or secured to the trustee.

The bankrupt retained the power to change at pleasure the beneficiaries designated in the policies. The policies and the power which he did not exercise for his own benefit are his property and the title therein vests in the trustee by operation of law, except so far as limited by the proviso contained in section 70a subdivision 5.

Hence the trustee has power to substitute himself or his estate as beneficiary in place of those designated and the policies should pass to the trustee as assets unless their surrender value is paid or secured to him by the bankrupt. It is thus established that these policies have a surrender value and that the trustee is vested with the power to obtain it.

By merely changing the beneficary to himself or his estate, the trustee will be paid the surrender value of the policies by the insurance companies, according to the established and recognized custom, just as they would do before or after bankruptcy to the bankrupt.

The designated beneficiaries have no vested interest present, past or future, in the surrender value but have only a mere expectancy or contingency in the policies at their maturity or at the bankrupt's death, so long as he retains the power to change beneficiaries. "The purpose of the proviso was to confer a benefit upon the insured" (*Holden* vs. *Stratton*, 198 U. S., 202, 213), and not upon any beneficiary, whether members of his family or relatives or strangers.

The appellant's contention is that as trustee he has the power to obtain the surrender value of these policies as hereinabove stated. If it were otherwise, a bankrupt could use creditors' money, buy insurance therewith, make the policies payable to any relative or third party instead as described in the proviso and then hold the policies before, during and after his discharge from bankruptcy, without, while in bankruptcy, paying their surrender value to the trustee. By a mere change of words the bankrupt will have made a provision for himself which survives bankruptcy and will have acquired property which is invulnerable against every form of legal but hostile endeavors by creditors. We submit that this is contrary to the intent and meaning of this section of the Bankruptcy Act.

POINT II.

Precedent and principle establish Appellant's absolute right to the Cash Surrender Value of these policies at the date of the bankrupt's adjudication or in the Alternative to the policies.

Only two Circuit Courts of Appeals have passed upon the precise questions of law involved viz,. the instant case, in which there are no questions of fact in issue, and *Malone* vs. *Cohn* (236 Fed. 882), discussed below. This latter decision was rendered by the Circuit Court of Appeals for the Fifth District and sustains appellant's contention. Both courts reached diametrically opposite conclusions upon the same state of facts (no questions of fact being in issue in either case) each claiming to be bound by the decisions in *Burlingham* vs. *Crouse*, 228 U. S. 459, and *In re Hammel*, 221 Fed. 56.

It is also significant that Hough, J. dissenting from the majority opinion of the learned Circuit Court of Appeals (p. 57) reached the conclusion contended for by appellant herein, after citing and distinguishing the same two authorities above mentioned.

The District Court, Hand, J. (p. 17) also intimates that it would have rendered a decision in favor of the appellant herein if it had not been controlled by that of the Circuit Court of Appeals *In Re Hammel* (*supra*).

In *Malone* vs. *Cohen* 236 Fed. 882, the policy had a surrender value at the date of the bankrupt's adjudication and he had reserved the right to change beneficiaries at will. At the date of adjudication the wife was the designated beneficiary and this designation remained unchanged at the time of the bankrupt's death. The trustee claimed the surrender value at the time of the bankrupt's adjudication, which the Court awarded to

him, while in the case at bar the Court's decision is to the contrary.

The differences between the two cases are that in the *Malone* case (*supra*) the bankrupt died after adjudication while in the case at bar he is still alive. In both cases the trustee claimed the surrender value at the date of adjudication, *not the amount of the policy at the time* of the bankrupt's adjudication or death. Included in that amount is the surrender value at the time of adjudication. This value existed during the lifetime of the assured and only he could obtain it by exercising his right to change beneficiaries and naming himself as such beneficiary in place of his wife who was the designated beneficiary. The bankrupt died without having changed the beneficiary and the wife therefore *then* obtained a vested right to the amount of the policy, subject however to any prior claims thereon or rights therein of other parties. These parties could be either or both, the insurance company for any loan it made on the policy or the trustee in bankruptcy for the surrender value at the date of adjudication. The trustee made and was awarded this claim and the same was paid to him, was deducted from the amount of the policy and the balance of this amount was paid to the wife. If there had been a loan on the policy that also would have been deducted from it but there was no loan.

In the case at bar the bankrupt is still alive and the only party who had any interest in the policies at the time of filing his petition and upon adjudication. That interest passed to the trustee, but is limited to the surrender value at time of adjudication by the proviso in Section 70a of the Bankruptcy Act. However, that limit is enlarged, so that the trustee can get the policies themselves, as property of the bankrupt, if their surrender value is not paid or secured to him. He therefore claims in the alternative that the policies be turned over to him, unless their surrender value is paid or secured to him, as provided in Section 70a and the proviso (*supra*).

The rights of the bankrupt and the beneficiary during the bankrupt's life time, after his death and at the maturity of the policies are fixed by the insurance contract itself which provides that the insured bankrupt has the right to change beneficiaries at will. No designated beneficiary could compel either insurer or insured to limit this right so that this beneficiary, he alone and none other should be and remain the only one. In other words could he transform his contingent interest or expectancy into a vested right? On the other hand the same contract provides that at the death of the assured or at the maturity of the policy the amount of same is payable to the designated beneficiary. On the happening of either of these events the designated beneficiary *then and then only* acquires a vested right to the amount of these policies, subject, however, to all the other conditions of the contract and the Bankruptcy Act, relating to insurance policies.

And again, if the designated beneficiary dies before the insured bankrupt or before the policy matures he has had no interest in the policy or its surrender value that would pass to his executors, as the insured bankrupt can change the beneficiary *after the latter's death.* The designated beneficiary must be alive at the time of the bankrupt's death (or at the maturity of the policies) before he can acquire any interest in the policies whatsoever. Under no other circumstances can he obtain a present interest any more than as beneficiary to a legacy in a will, until after the death of the testator.

Neither the *Crouse* nor *Hammel* case (*supra*) is controlling on the facts of the case at bar.

In *Burlingham* vs. *Crouse*, *supra*, the bankrupt's policies at the time of filing the petition had no cash surrender value, as the amount of same had then been exhausted by a loan made by the bankrupts from the insurance companies for which they assigned their policies to them as sole security at the time of the loan. Two months prior to bankruptcy, the bankrupts assigned the policies to Crouse, subject to the loan made from the insurance companies, as collateral security for a debt of the bankrupts to Crouse.

The questions decided in that case were: that the policies had no surrender value at the time of filing the petition, therefore there was nothing to pass to the trustee, and that though the assignment to Crouse was made two months prior to bankruptcy, it was not deemed as contravening the Bankruptcy Act, as the policies were *then* exempt and the assignee could hold the policies free from the claims of the bankrupt's creditors, subject only to the loan from the insurance company, and could deal with the policies as his own, as the court could see no reason for limiting or restraining the freedom of the assignee Crouse, to deal with his property as he wished.

In the case at bar the policies have a surrender value both after and before lapse and while they are payable to a niece and two married sisters the bankrupt had the power to make himself the beneficiary, which power vests in the trustee under Section 70a paragraph 3 and 5, and the policies pass to him unless their surrender value is paid or secured to him.

The Court in *Burlingham* vs. *Crouse* supra, cited *Hiscock* vs. *Mertens*, 205 U. S. 202, *Holden* vs. *Stratton* 198 U. S. 202 and *re McKinney*, 15 Fed. 535; approving these decisions in pertinent language of its own. They all upheld the position of the trustee, as maintained by him in this case.

In the *Hammel* case (*supra*), the policies were said to have only a loan value, which was said to be different from the cash surrender value and the beneficiary was the bankrupt's wife.

In the case at bar, the policies have a Surrender Value and the beneficiaries are a niece and two married sisters.

In the *Hammel* case (*supra*) the trustee made a motion to compel the bankrupt to change the beneficiary and to make himself, the bankrupt, the beneficiary instead of the wife. This was refused on the ground that disobedience would subject the bankrupt to imprisonment. The Court however said: "*Possibly the trustee, if the designation were changed to insured's estate, might*

himself obtain the amount of the loan from the company—that proposition need not be passed upon."

In the case at bar, the policies have a surrender value, the trustee makes the application to obtain it, recognizing the disability of the bankrupt to do so. The extent of the public policy invoked is satisfied by the proviso in Section 70a, which is for the benefit of the *bankrupt only*, and neither by words nor implication does it include any other person. But if the wife were to share in this benefit, could it also apply to married sisters and nieces? If any one but the bankrupt is to have the benefit of the proviso then it can be extended to the remotest relatives or even strangers and the statute would include what it did not intend nor contemplate. The bankrupt having the power to make himself the beneficiary would have the supreme control and could defeat the statute as well as the wife and relatives, if it intended to benefit them. To expand public policy to the extent of the Hammel case is not warranted by either the language employed in the proviso nor by any inference therefrom.

The bankrupt himself was left, before bankruptcy, to provide for his family by designating them beneficiaries, contingent on divorce, separation or death, but waiving his right to change beneficiaries, which would have given them a vested interest, instead of a mere expectancy or contingency, subject to his whim or will, which, while he retains such power is equivalent to a provision for his own benefit whenever he chose to make himself the beneficiary before bankruptcy or after his discharge therefrom.

And again, if the trustee could have obtained the loan value of the policy, as indicated by the court, *a fortiori* why can he not obtain its surrender value, the very thing the proviso explicitly authorizes him to have? Furthermore, both surrender and loan value are derived from the same source, the full reserve of the policies after three years' premiums have been paid, and they are indifferently and interchangeably called by either of these names by the insurance companies to denote

the VALUE of policies at a given date the amount being the same in most of them or differing only slightly.

The Court in *Hiscock* vs. *Mertens*, 205 U. S. 202, decided that the phrase "Cash surrender value" has no *technical meaning* and is understood to mean *value*. In *Everett* v. *Judson*, 228 U. S. 474, the surrender value was directed to be paid to the trustee, although the policy did likewise not follow the identical wording of the statute. Mr. Justice Hough cites this case in his dissenting opinion.

Since the Hammel case, which was decided in February, 1915, numerous district court decisions have been made along the lines culminating in the result reached in *Malone* vs. *Cohen* (*supra*).

We cite only some of these:

In the Matter of Shoemaker, 225 Fed. Rep. 329.
In the Matter of Jameson Brothers, 222 Fed. Rep. 92.
In Re Bonvillain, 232 Fed. Rep. 370.
In the Matter of Flanigan, 228 Fed. Rep. 339.

The following cases which held similar views were decided prior to the Hammel case, viz.:

Andrews vs. *Partridge*, 228 U. S. 479.
In Re Welling, 113 Fed. Rep. 189.
In Re Herr, 182 Fed. Rep. 715.
In Matter of White, 174 Fed. 333.
In Re Wolff, 165 Fed. Rep. 984.
In Re McKinney, 15 Fed. Rep. 535.

It is submitted that no decision contrary to appellant's contention, other than the decision appealed from, has been made involving an interpretation of Section 70a and its proviso under facts similar to those in the instant case. The question is *res nova* to be decided by this Court solely upon principle.

POINT III.

These policies are not exempt under the Laws of the State of New York.

The domestic Relations Law of the State of New York provides as follows:

> Par. 52.—"INSURANCE OF HUSBAND'S LIFE—A married woman may, in her own name, or in the name of a third person, with his consent, as her trustee, cause the life of her husband to be insured for a definite period, or for the term of his natural life. Where a married woman survives such period or term she is entitled to receive the insurance money, payable by the terms of the policy, as her separate property, and free from any claims of a creditor or representative of her husband, except, that where the premium actually paid annually out of the husband's property exceeds five hundred Dollars, that portion of the insurance money which is purchased by excess of premium above five hundred Dollars, is primarily liable for the husband's debts."

The above provisions apply only to policies taken out by the wife upon her husband's life for her own benefit. She then becomes the *absolute beneficiary* under the terms of the contract between herself and the insurance company and neither husband nor his creditors can deprive her of this benefit.

We respectfully refer the Court to the following decisions by Bankruptcy and New York State Courts on the above section and point.

In re Wolff, 165 Fed. 984;
Matter of White, 174 Fed. 333;

Lowenstein vs. *Koch*, 165 N. Y. App. Div. 760;
Lauterbach vs. *N. Y. Ins. Co.*, 62 N. Y. Misc. 561, 565;
Jacobs vs. *Strumwasser*, 84 N. Y. Misc. 28;
Cavagnavo vs. *Thompson*, 78 N. Y. Misc. 687, 688;
Clark vs. *Shaw*, 91 N. Y. Misc. 245, 247.

POINT IV.

The decree of the Circuit Court of Appeals should be reversed.

Dated, New York, September 7, 1917.

Respectfully submitted,

Lawrence B. Cohen

LAWRENCE B. COHEN,
Solicitor for Petitioner.

LAWRENCE B. COHEN and
ADOLPH BOSKOWITZ,
of Counsel.

Supreme Court of the United States

OCTOBER TERM—1917.

No. 359.

SAMUEL C. COHEN, as Trustee in Bankruptcy of Elias W. Samuels, Bankrupt,
Petitioner,

against

ELIAS W. SAMUELS,
Bankrupt.

BRIEF OF BANKRUPT.

SAMUEL STURTZ,
Solicitor for Bankrupt.

INDEX.

CITATIONS.

Supreme Court of the United States

SAMUEL C. COHEN, as Trustee in Bankruptcy of ELIAS W. SAMUELS, bankrupt,
Appellant,

against

ELIAS W. SAMUELS,
Appellee.

BRIEF OF APPELLEE.

Statement of Facts.

The questions for consideration on this appeal are:

1. Where, in a life insurance policy upon a bankrupt's life the beneficiary is the wife of some third person, and the right to change the beneficiary is reserved, does the cash surrender value on such a policy constitute an asset of the bankrupt, within the meaning of Section 70a (5) of the Act, which would pass to the trustee in bankruptcy?

2. Does the right to change the beneficiary constitute an asset, within the meaning of Section

70a (3) of the Act, which would pass to the Trustee in Bankruptcy who would thereby become vested with the right to claim the cash surrender value by himself exercising the power reserved?

The policy of the Penn Mutual Life Insurance Co. was issued May 1st, 1909, payable to the bankrupt's brothers (page 29, fol. 51), and was subsequently (March 2nd, 1915), changed and made payable to the bankrupt's sister and niece (page 28, fol. 50). The provisions of this policy as to cash surrender values provide that payment of the same arise after a lapse and within one month thereafter (page 31, fols. 55 to 57).

The policy of the Mutual Life Insurance Company, at its issuance, June 24th, 1905, was payable to the bankrupt, and on February 6th, 1908, the bankrupt changed the beneficiary to his mother (page 42, fol. 63). His mother having died on May 10th, 1908, he subsequently (May 10th, 1910), changed the beneficiary to his sister (page 43, fol. 64) and it has remained so ever since. This Company requires the consent of both the assured and beneficiary to the payment of the cash surrender value (page 47, fol. 71).

The policy of the Equitable Life Assurance Society was issued on December 29th, 1899, payable to the bankrupt's mother (page 47, fol. 71). She having died, the beneficiary was changed to the bankrupt's sister on July 6th, 1911 (page 52, fol. 78), and it has remained so ever since. *This policy provides that a surrender value only arises in case of a lapse* (page 49, fol. 74). No lapse occurred at the time when the petition was filed, and it appears to be the rule of the Company not to

allow cash surrender values prior to lapse, but that if prior payments were to be made, they would require in addition to the assured's release, a release from the existing beneficiary (page 53, fol. 79).

POINT I.

The jurisdiction of the bankruptcy court is statutory.

The origin of Courts of Bankruptcy is statutory and they have no powers or jurisdiction other than is conferred on them by or necessarily implied from the Statute. The provisions of the Bankruptcy Act are in derogation of the Common Law, under which the parties are against their consent deprived of rights by certain proceedings, and must in their interest be construed strictly, and as so construed closely followed.

> Collier on Bankruptcy, 10th Edition, page 23.
>
> Bardes vs. Hawarden Bank, 178 U. S., 524.
>
> In re Elmira Steel Co., 109 Fed Rep., 456.

In this case the Court said (page 477):

> "It is a rule that in statutory proceedings in "derogation of the Common Law to divest one "of his property, every requirement of the "Statute having even a semblance of a bene- "fit to the owner must be complied with in "order to divest him of his title. * * * While "the prohibition of the Constitution against

"taking property without due process of law "must, as a prohibition against legislation, "yield to the constitutionally conferred power "upon Congress to establish a uniform system "of bankruptcy, it does furnish a rule of con- "struction of legislation establishing such "system of bankruptcy and a test for pro- "cedure under that legislation."

In re Williams, 120 Fed. Rep., 39.

In this case the Court said (page 39):

"Bankruptcy Courts like all other National "Courts, although not courts of inferior juris- "diction, are courts of limited jurisdiction. "They are creatures of the Statute, and pos- "sess no powers except those conferred upon "them either expressly or by necessary implica- "tion."

At page 40, the Court again said:

"* * * In determining this matter the "Court must not be influenced by an appeal "that unless it assumes jurisdiction great in- "justice may result from such refusal. Con- "gress alone can grant the jurisdiction and "courts overstep their constitutional limits, "whenever they attempt to remedy the real "or imaginary defects of the Statutes."

So that in considering the sections under view, we must keep in mind the rules above referred to, and construe them according to what Congress actually intended. The Court cannot read into

these sections anything which would be contrary to the intent of Congress.

POINT II.

The cash surrender values were no part of the bankrupt's estate at the time when the petition in bankruptcy was filed.

The Trustee's brief argues from the standpoint that as none of these policies were payable absolutely to the designated beneficiaries, thus placing it beyond the power of the assured to change a beneficiary (which power had been reserved) the beneficiaries have no interest in these policies. That where a policy reserves the right in the assured to change the beneficiary, it is not the kind of a policy which makes a permanent provision for the designated beneficiaries, be they the wife, children or other relatives, but that the only way to procure that permanent provision is by having the policy assigned to the beneficiary or payable to the beneficiary without the reservation. That the Trustee could change the beneficiary to himself as such, or to the bankrupt's estate and obtain the surrender value.

Section 70a-5 of the Bankruptcy Act provides:

> "* * * Provided that when a bankrupt shall "have any insurance policy which has a cash "surrender value, *payable to himself, his es-* "*tate or personal representatives*, he may * * * "pay or secure to the trustee the sum so ascer- "tained. * * *"

Until the decision of the Supreme Court of the United States in

Burlingham vs. Crouse, 228 U. S., 459,

different views were taken by the Referees and the Courts as to the construction of this provision. This case settled the question so long undecided and held that the trustee was entitled only to *that sum which was available to the bankrupt at the time of the bankruptcy as a cash asset, or otherwise the benefit of the policy was left to the insured.*

At page 467 the Court said:

> "Subdivision 5 undertakes to vest in the "trustee property which, prior to the filing of "the petition, the bankrupt could by any "means have transferred or which might have "been levied upon or sold under judicial pro-"cess against him. * * *"

Then, in the opinion, follows the proviso with reference to insurance policies having a cash surrender value, and the Court then said, at page 472:

> "Congress recognized also that many policies "at the time of the bankruptcy might have a "very considerable present value which a bank-"rupt could realize by surrendering his policy "to the Company. We think it was this latter "sum that the Act intended to secure to cred-"itors by requiring its payment to the trustee "as a condition of keeping the policy alive. In "passing this statute, Congress intended, while "exacting this much, that when that sum was

"realized to the estate, the bankrupt, should be "permitted to retain the insurance which, be- "cause of advancing years or declining health, "it might be impossible for him to replace. It "is the two fold purpose of the Bankruptcy Act "to convert the estate of the bankrupt into "cash and distribute it among creditors and "then to give the bankrupt a fresh start with "such exemptions and rights as the Statute "left untouched. In the light of this policy, "the act must be construed. We think it was "the purpose of Congress to pass to the trus- "tee the sum which was available to the bank- "rupt at the time of the bankruptcy as a cash "asset, otherwise to leave to the insured the "benefit of his life insurance."

Now what does this mean? It means that the trustee was entitled to the surrender value which was available to the *bankrupt's estate.* In the Burlingham case the policy was made *payable to the bankrupt's estate* and the question arose whether the trustee was entitled to the entire amount of the insurance policy, since the bankrupt died after adjudication. The Court held that he was only entitled to the cash value which existed at the time when the petition was filed, and the balance of the policy went to the bankrupt's executor. *That policy was payable direct to the bankrupt's estate and not to any designated beneficiary.* It was the bankrupt's policy; his own property in which no one else was interested. The argument in the trustee's brief that the absolute property right in these policies was in the insured and not in the beneficiaries is not so. The fact that some policies and the rules of the company

provide for the assent of the beneficiary to obtain the surrender value in itself shows that these beneficiaries had some interest in these policies of which they could not be deprived. How then can the Court substitute the trustee for the bankrupt, so that he may surrender the policy and obtain its cash value? The rule of the company or condition in the policy requiring the assent of the beneficiary is a just one. If the trustee is substituted and demands of the company the cash value which it refuses because of the lack of consent of the beneficiary, could the Court, under fear of imprisonment, compel the beneficiary to assent? We do not think that the Court has any such power.

It has been held in many cases that in the case of co-operative associations, the beneficiary had no vested interest in the insurance where the member possessed an option to change the beneficiary at his pleasure without the consent of the beneficiary named in the policy, and in the State of New York the right to make such change is provided for in the Insurance Law, and consequently the insured's benefit is regarded as attached to the membership and not to the beneficiary named.

> Insurance Laws of New York, Consolidated Laws, Article 6, Section 211;
> Steinhausen vs. Preferred Mutual Accident Association, 59 Hun, 336, 339;
> Smith vs. National Benefit Society, 123 N. Y., 85, 88.

In other words, the right of indemnity does not arise upon contract, but is a mere feature of the membership and cannot be disconnected therefrom. The certificate is not a chose in action like an ordi-

nary policy of life insurance in which a right of property may vest, and the only right of the member is to exercise a power of appointment over the same.

In the matter at bar the policies are entirely unlike that of co-operative insurance to which the above rule may apply. The policies of insurance in the matter at bar are not a membership benefit, but a contract obligation.

> Washington Central Bank vs. Hume, 128 U. S., 205.

These policies at the time when the petition in bankruptcy was filed were payable to designated beneficiaries who happened to be relatives of the bankrupt, and though the policies gave the right to the bankrupt to change the beneficiaries without their consent, yet this means nothing more than that a right upon his part to terminate the security he had provided for the beneficiaries. Naturally, if he dies in the meantime, before making such change, the beneficiaries are entitled to the amount of the policy. It is inconceivable to see how the trustee claims that the beneficiaries have no interest in the policy when they have a right to collect the insurance money upon the death of the assured. The beneficiaries possessed either a vested interest in the policy or had merely an expectancy, and how can it be claimed that the mere right to terminate a contract operates to make its obligations a mere expectancy only? It is true that the beneficiaries' rights may be terminated by the action of the assured, but does that create any expectancy or make the interest of the beneficiaries

a mere contingency? The rights of the beneficiaries are contract rights and are vested and complete and the power of the assured to terminate the same by change of beneficiary is *a mere conditional limitation which, when exercised,* terminated their rights, but does not make their interest in the policy any the less of a vested nature. *Unless the policy is payable to the insured or has a surrender value payable by its terms to him alone, he has no interest that passes to the trustee.*

Matter of Buelow, 98 Fed. Rep., 87;
Matter of McDonald, 101 Fed. Rep., 239.

A policy that does not assure to the bankrupt some actual value as an asset does not pass to the trustee.

Gould vs. New York Life Insurance Co., 132 Fed. Rep., 927;
Clark vs. Equitable Life Assurance Society, 143 Fed. Rep., 175.

As to the policies of the Mutual Life Insurance Company and Equitable Life Assurance Society, the record shows that the surrender values are not payable except with the consent of the beneficiary. Such consent is necessary, as, before payment is made, the policy and all claims thereunder must be surrendered to the company. A surrender by the assured without the consent of the beneficiary would be invalid and void.

In the State of New York it has been held repeatedly that where a policy has been issued by a company upon a person's life, payable to a third party, that the persons for whose benefit the insurance is

taken out are the parties with whom the contract is made, and that the beneficiaries have a vested interest therein of which they cannot be deprived without their consent. The insured is considered to be the agent of such parties in taking out the policy and in making them the beneficiaries, and in the performance of such acts as are consistent with its terms and which should be performed in support and promotion of their interests. Such agency, however, it has been expressly held, does not extend to any act in hostility to or derogation of the beneficiaries' interest.

Whitehead vs. New York Life Insurance Co., 102 N. Y., 144;
Schneider vs. United States Life Insurance Co., 123 N. Y., 109;
Garner vs. Germania Life Insurance Co., 110 N. Y., 267;
Stillwell vs. Mutual Life Insurance Co., 72 N. Y., 385;
U. S. Trust Co. vs. Mutual Benefit L. Ins. Co., 115 N. Y., 152;
Walsh vs. Mutual Life Insurance Co., 133 N. Y., 408.

The most that can be claimed is that the assured had a right to terminate the interest of the beneficiaries by making a change, but assuming that he had such right to change the beneficiary, that would not give him any interest in the policy at the time when the petition was filed and which would pass to the trustee, as the policies did not mature at the commencement of the bankruptcy proceedings and hence there was nothing for the trustee to receive.

The Circuit Court of Appeals for the Second Circuit passed upon the question in the case of

Matter of Hammel, 34 Amer. B. R., 46.

In that case the policy upon the bankrupt's life was made payable to his wife. It had no cash surrender value, but did have a loan value, and policy provided that the insured might change the beneficiary at any time. The matter came before the same Referee before whom these applications were heard, and he held that the bankrupt could not be compelled to change the beneficiary to himself so as to obtain the loan thereon and pay it to the trustee. The Referee's decision was reversed by the District Court, but sustained by the Circuit Court of Appeals. In the opinion written by Lacombe, Ch. J., the Court refers to the Burlingham vs. Crouse case and cited that portion of the opinion of the Burlingham vs. Crouse case which says:

> "True it is that life insurance policies are "a species of property and might be held to "pass under the general terms of subdivision "5, section 70a, but as a proviso dealing with "a class of this property was inserted and "must be given its due weight in construing "the policy."

It is true that the Hammel case had reference to loan value, but the Court said:

> "The contention is that the insured could, "under the power reserved in the contract with "the Insurance Company, cancel the original

"designation of the beneficiary and substitute "himself or his estate, should then obtain the "loan from the company and turn it over pos- "sibly to the trustee if the designation were "changed to the insured's estate. * * * "Twelve years ago the bankrupt took out this "policy for the benefit of his wife so as to se- "cure to her $3,000 in the event of his death. "This was a laudable and proper thing to do. "Public policy insures the making of such pro- "visions for an uncertain future. The policy "contains a clause authorizing the insured to "change his beneficiary, a perfectly proper "clause, she might predecease him or desert "him or become unfaithful. There is nothing "to suggest any such reason for making the "change. On the contrary, the presumption "is that now, when he is a bankrupt and his "death in the near future would, except for "this insurance, possibly leave her in poverty, "he would not voluntarily cancel his designa- "tion or her as beneficiary. It cannot be as- "sumed that, of his own mind, he would take "away from her the small sum which the bene- "ficial system of life insurance and his own "savings during twelve years have made it pos- "sible to secure to her as a last resort should "he die and leaving nothing behind him. The "proposition that he should be constrained "against his will by an order enforceable by "imprisonment in the event of disobedience to "deprive his wife of her present interest in the "policy, to make himself the beneficiary, to bor- "row two-thirds of the $3,000 from the com- "pany, and turn it over to his creditors and "then to make her again the beneficiary of the

"remaining one-third seems contrary to public "policy and to good morals. We are unwilling "to give this effect to the statute unless con- "strained to do so, either by its language or "by controlling authority. Since we are not "satisfied that Burlingham vs. Crouse requires "such disposition of the question presented, the "order of the District Court is reversed."

The following cases were decided by the United States Supreme Court at the same time as Burlingham vs. Crouse case. Reference is made to them because upon examination it will be found that *the policies were made payable to the bankrupt's estate*, and these cases also referred to the Burlingham case.

Everett vs. Judson, 228 U. S., 474;
Andrews vs. Partridge, 228 U. S., 479.

The following case construes the Burlingham vs. Crouse case and has a state of facts similar to those at bar.

Matter of Lyon, 32 Amer. B. R., 483.

In this case the Court held, *the cash surrender value of an insurance policy on the life of a bankrupt passes to the trustee and not the policy of insurance itself.* That the only cash surrender value that passes to a trustee is the cash surrender value *payable to the bankrupt himself, his estate or personal representatives.* Hence, where a cash surrender value of a policy on the life of a bankrupt is only payable upon the joint consent of the bankrupt and beneficiary, his wife, it is not an asset

passing to the trustee in bankruptcy. At page 486, the Court said:

"Prior to the decision of the Supreme Court "in the case of Burlingham vs. Crouse there "was much doubt as to the rights of the in-"sured and beneficiaries under policies having "a cash surrender value, and containing a ben-"eficiary other than the insured and reserving "the right to change the beneficiary in the in-"sured. As is pointed out in Burlingham vs. "Crouse aforesaid, different views were taken "of Section 70 (5) of the Bankruptcy Act, and "conclusions irreconcilably different were "reached by the Courts in accordance with the "view of said section of the Bankruptcy Act "adopted.

"It appears to be established in Burlingham "vs. Crouse, that the proviso contained in Sec-"tion 70 (5) though in form usually employed "to limit the general terms immediately pre-"ceding it, is not to be so construed, but is to "be regarded as additional legislation, and that "by said additional legislation it is only the "cash surrender value of the policies having "such cash surrender value payable to the "bankrupt, his estate or personal representa-"tives, that passes in the first instance to the "trustee subject to redemption by the bank-"rupt, and that the policy does not pass to "said trustee until the bankrupt has failed to "redeem it. * * *

"(Page 487.) The only cash surrender value "that pases to the trustee is the cash surrender "value payable to the bankrupt, 'himself, his "'estate or personal representatives.' In each

"of the policies, the cash surrender value can "only be obtained according to the custom of "the company on a receipt of the bankrupt, and "beneficiary. It is argued, that because the "beneficiary is the wife of the bankrupt, and "that she in all probabilities would not refuse "her signature to the payment of the cash sur- "render value to her husband, therefore, this "provision of the policy requiring her consent "should be disregarded, and the policy be con- "strued as if the cash surrender value was "payable solely to the bankrupt himself. The "Referee cannot accept this view. The custom "of the company in requiring the consent of "the beneficiary is, it seems to the Referee a "perfectly lawful requirement, and binding on "the bankrupt and therefore upon his trustee. "It confers some rights upon the beneficiary, "the wife of the bankrupt." Affimed by the District Court.

Matter of Young, 31 Amer. B. R., 29.

This case held that under the provisions of Sections 6 and 70 (a) policies made payable to the bankrupt's wife wherein he expressly retains the right to change the beneficiary at any time, without her consent, and is granted the right to receive at his sole option at any time the stipulated surrender value, the policies having a cash surrender value at certain periods which may be taken by the bankrupt without the consent of the beneficiary, cannot be sold by the trustee in bankruptcy for the benefit of creditors.

Matter of Churchill, 31 Amer. B. R., 1.

In this case the policy was payable to the wife of the bankrupt, or in the event of her prior death to the insured's estate, and the Court held that the cash surrender value did not pass to the trustee and refers to the Burlingham vs. Crouse case.

Matter of Pfaffinger, 21 Amer. B. R., 255.

Where a policy of life insurance, upon a husband's life is payable to his wife, but under the contract he may, with the consent of the insurance company, change the beneficiary, the policy does not pass to his trustee in bankruptcy and the fact that after his adjudication he applied in his own name for the surrender value of the policy, which was not paid to him, does not affect the rights of the wife thereunder.

Matter of Lange, 1 Amer. B. R., 189;
Matter of Hernich, 1 Amer. B. R., 713.

Two of the policies, viz., the Equitable and Mutual, require the written assent of the beneficiary to the payment of the cash surrender value. Irrespective, however, as to whether the assent of the beneficiary is required or not, the bankrupt claims that under the authorities construing the statute, he cannot be compelled to change the beneficiary to himself so as to secure the surrender value to the trustee. The beneficiaries cannot be compelled to give up their interest in the policies. At the time when the petition was filed, there was no cash surrender value due upon any of the policies as they were not payable to *the bankrupt or his estate.*

Under the Hammel case, the bankrupt cannot be forced to change the beneficiary to himself so as to

satisfy the wishes of the trustee; furthermore as there was no cash surrender value payable to the *bankrupt or his estate* when the petition was filed, in accordance with the decision in the Burlingham vs. Crouse case, it is contended that there was no cash surrender value in existence at the time when the petition was filed that in itself passed to the Trustee as an asset. These beneficiaries have been such for some time and it is improbable to believe that the bankrupt will change them when the policies are now made payable to immediate relatives of the bankrupt. Did Congress intend that where policies are payable to designated beneficiaries (immediate relatives) if the bankrupt died after bankruptcy they should be left paupers?

As Judge Lacombe said in the Hammel case:

> "It seems contrary to public policy and to "good morals. We are unwilling to give this "effect to the statute unless constrained to do "so, either by its language or by controlling "authority."

The Statute, Section 70-a, Subdivision 5, must be construed in the light of the intention of Congress in passing the law. It distinctly provides for the cash surrender value which is payable to the bankrupt or his estate. If Congress had intended to include all life insurance policies which had a surrender value, it could have provided, that, when a bankrupt shall have any insurance policy which has a cash surrender value it may be paid to the trustee, and the words "payable to himself, his estate or personal representatives" could have been omitted. There was an intent on the part of Congress in inserting these words, to limit the trustee

to the surrender value of those policies which were the *property of the bankrupt* at the time when the petition was filed; and evidently did not consider that policies upon the life of a bankrupt, payable to designated beneficiaries, were the property of the bankrupt. If it had thought so, those words could have been eliminated and the proviso would have covered every policy upon the life of the assured, irrespective as to who the beneficiary might be. The proviso was inserted for the beneficent purpose of protecting the bankrupt who might be unable to obtain other insurance because of advanced years. As the Court said in the Burlingham vs. Crouse case:

> "In passing this statute, Congress intended "while exacting this much that when that sum "(meaning surrender value) was realized to "the estate, the bankrupt should be permitted 'to retain the insurance which, because of ad-"vancing years or declining health, it might be "impossible for him to replace."

In the Trustee's brief (page 16), it says:

> "The Trustee contends that the policies are "non-exempt property of the bankrupt the "title whereof vests in the Trustee under para-"graph 5, Section 70A, so that the power also "vests in the Trustee to designate himself the "beneficiary under paragraph 3, Section 70A, "so that he has a complete title and can deal "with these policies as with other non-exempt "property of the bankrupt."

This proposition is not correct. *The title to the policies does not vest in the Trusttee.* All he

would be entitled to would be the interest of the bankrupt in the surrender value (if any) which existed at the time when the petition was filed.

Sanders vs. Aetna Ins. Co. et al., 31 Amer. B. R., 854.

Here the Court said (page 856):

"It will be observed that policies of insur-
"ance are placed upon different footing from
"all other property vested in the Trustee, and
"that it was not intended that the policies,
"but only cash surrender value, should become
"assets unless the assured failed to comply
"with certain prescribed conditions. It is true
"the proviso contemplates a benefit to the bank-
"rupt's Estate and when the policies have a
"cash surrender value they are vested in the
"trustee by operation of law in order that
"said value may be added to the assets."

Matter of Fetterman, 39 Amer. B. R., 834.

The Court said (page 837):

"Obviously Section 70A of the bankruptcy
"Act applies only when an insurance policy
"has a cash surrender value payable to the
"bankrupt, his estate or personal representa-
"tives. The language used admits of no other
"conclusion. If a policy is made payable to
"some person other than the bankrupt, mani-
"festly the proceeds thereof do not belong
"to him and are not a part of his assets which
"would pass to the Trustee." * * * If the cash

"surrender value is payable only to the as-
"sured with the consent of all persons inter-
"ested in the policy or on a release of a per-
"son's interest, then manifestly the same con-
"clusion follows, for the beneficiary is a per-
"son who owns, or is primarily interested in
"the cash surrender value, and it is his consent
"or release which the Company must have be-
"fore paying the cash surrender value. That
"the rights or interest of the beneficiary of
"the policy even if the insurance has been ob-
"tained by the insured, and the premiums are
"paid by him, are, as herein stated, is suffi-
"ciently evidenced by the following authori-
"ties." Among the authorities cited are Washington Central Bank vs. Hume; Burlingham vs. Crouse; Everett vs. Judson and Andrews vs. Partridge, supra.

The Circuit Court of Appeals in its opinion in the case at bar said (page 56, fol. 85):

"The question is one of the construction of
"this proviso in the Statute."

It certainly does not require any amount of study to ascertain the meaning of the proviso. It is plain and concise and was rightly construed by the Circuit Court of Appeals. If any change is to be made along the lines contended for by the Trustees, then Congress alone has that power. The Courts can merely construe the Statute as it is.

POINT III.

The reservation of a power to change a beneficiary is not an asset which passes to the trustee.

The Trustee in his brief claims that the power to change the beneficiaries, reserved in the policies in question, vests in the Trustee, thereby giving to the Trustee the privilege of designating himself as beneficiary under paragraph 3, Section 70A, and in that way the Trustee would acquire complete title to the policies and could deal with them as with other non-exempt property of the bankrupt (page 16).

Section 70A (3) provides: That the Trustee in bankruptcy shall be vested by operation of law with the *title of the bankrupt* to all (3) "powers which he might have exercised for his own benefit but not those which he might have exercised for some other person."

As was stated under Point II, the right reserved by the bankrupt to change the beneficiaries was a right to terminate the interest of the beneficiaries by making a change. In other words, *the power was simply a privilege.* It does not constitute property which by operation of law vested *a title* in the Trustee.

Section 70A starts off by providing that the Trustee * * * shall in turn be vested by operation of law with the title of the bankrupt * * * to all, and then enumerates the different provisions including subdivision 3.

The Bankrupt contends that the privilege of changing a beneficiary is not a power contempted by paragraph 3 of Section 70A of the Act. *It is*

not property which has a title in the bankrupt passing to the Trustee, but is simply a privilege or a right that the assured might have exercised. It is not an interest in property which can be transferred to another nor can it be sold on execution nor devised by Will. The assured could exercise the power of changing the beneficiary, but he could not vest that power in any other person to be so executed. It is not a chose in action and does not constitute assets which would pass to the Trustee.

Jones vs. Clifton, 101 U. S., 225.

This was an action by an assignee in Bankruptcy under the Act of 1867 to set aside two deeds executed by a husband to his wife and to compel a transfer to the assignee of property and policies of insurance mentioned in the deed. The deed contained a clause reserving to the bankrupt the power to revoke the grant and assignment in whole or in part and to transfer the property to any other person that he might designate. The assignee in bankruptcy, contended, among other things, that power of revocation and apportionment were assets which passed to the assignee in bankruptcy and could be executed by him for the benefit of creditors. The Court said (page 229):

"The powers of revocation and appointment "to other uses reserved to the husband in the "deeds in question do not impair their validity " or efficiency in transferring the estate to the "wife to be held by her until such revocation "or appointment be made. Indeed such reser- "vations are usual in family settlements and "are intended 'to meet the ever varying inter-

"'ests of family connections.' Riggs vs. Mur-
"ray, 2 Johns (N. Y.), Ch., 565. So frequent-
"ly is the necessity of a change in the uses of
"property thus settled, arising from the alter-
"ed condition of the family, the addition or
"death of members, new occupations or posi-
"tions in life, and a variety of other causes
"which will readily occur to everyone, that
"the absence of a power of revocation and
"appointment to other uses in a deed of
"family settlement has often been considered
"a badge of fraud. * * * The title to the
"land and policies passed by the deeds; a
"power only was reserved. That power is not
"an interest in the property which can be
"transferred to another or sold on execution
"or devised by Will. The grantor could, in-
"deed, exercise the power either by deed or
"Will, but he could not vest the power in any
"other person to be thus executed. Nor is the
"power a chose in action. It did not, there-
"fore, in our judgment, constitute assets of the
"bankrupt which passed to his assignee."

Sanders vs. Aetna Ins. Co. et als., 31
Amer. B. R., 854.

The Court said (page 860) in a concurring opinion:

"I concur with the Chief Justice for the rea-
"son that the Statute provides that the Trus-
"tee in Bankruptcy shall take '(3) powers
"'which he (the bankrupt) might have exer-
"'cised for his own benefit, but not those
"'which he might have exercised for some

"'other person.' It is beyond question that "the bankrupt might have exercised this right "for some other person. He did. The rule "of statutory construction is that, where there "is a conflict between two provisions of the "Statute, the last shall govern as the last ex- "pression of the Legislative Will. So it seems "to me that, where circumstances throw a case "under the last clause, then the last clause "must govern. Inasmuch as the Statute dis- "tinctly says that the power which he might "have exercised for some other person shall "not go to the Trustee, the Courts have no "right to award these policies to the Trustee, "if we do, we violate the terms of the Act. If "Congress had intended to confine the exemp- "tion to those powers that the bankrupt might "have exercised exclusively for others, it was "easy to have said so. The proviso to Item 5 "treats of policies payable to the bankrupt or "his estate and made no other provision as "though it had exhausted the subject. It is "difficult to see how a policy which has no cash "surrender value and not payable to the bank- "rupt or his estate passes to the Trustee. The "intention is to save insurance not to destroy "it. Item 5 does not control Item 3, however, "as Item 3 is a special provision and Item 5 "is a general provision. * * * Whatever "we may now think of the propriety of allow- "ing a debtor to take money that ought to go "to his creditors and with it buy life insur- "ance for the benefit of his family and allowing "the family to collect and enjoy the proceeds "of the policy to the entire exclusion of the "creditors, even from that portion represented

"by the premiums paid, still the law is too "well settled to doubt its existence or escape "its consequences, except by statutory enact- "ment. Here the enactment is the other way. "Again the Trustee must take the required "steps to change the beneficiary before he can "claim the proceeds of the policy."

The Trustee claims that the power to change a beneficiary passed by operation of law to the Trustee upon the filing of the petition. If such were the fact the Trustee would then be required to take certain steps to change the beneficiary before he could claim the proceeds of the policy. When the insured becomes a bankrupt and the claim is made that a policy of insurance on his life or the reserved power to change the beneficiary has passed to his trustee in bankruptcy, that is, if anything, legally an assignment of the policy. If it be anything, it is an assignment by operation of law of the bankrupt's interest to his trustee in bankruptcy. Therefore the adjudication in bankruptcy if it transfers the insured's interest to the Trustee, thereby at once destroys the power reserved in the contract to change the beneficiary. So that if the Trustee is the assignee by operation of law of the interest of the insured, the beneficiaries' rights in the policy never can be taken away because so far as the insured is concerned the policy has been assigned. The beneficiaries' interest in the policy, unless they voluntarily relinquish it, *can be destroyed in only one way under the contract, and that is by a change of the beneficiary in accordance with and under the conditions stated in the policy itself.* If the insured's interest is passed to the Trustee, the insured could not change the bene-

ficiary because his interest has been assigned by operation of law and he has no interest in the contract. The Trustee would have no right to change the beneficiary because if the Trustee be anything, he is in legal effect an assignee of the insured's interest, and an assignee cannot change the beneficiary. That right or privilege is reserved to the assured only.

POINT IV.

The decree of the Circuit Court of Appeals should be affirmed.

Dated, New York, September 21st, 1917.

Respectfully submitted,

SAMUEL STURTZ,
Solicitor for Bankrupt.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 359.

SAMUEL C. COHEN, as Trustee in Bankruptcy of ELIAS W. SAMUELS, *Bankrupt*,

Petitioner,

vs.

ELIAS W. SAMUELS,

Bankrupt.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

REPLY BRIEF OF TRUSTEE

LAWRENCE B. COHEN,
Solicitor for Petitioner Samuel C. Cohen.

LAWRENCE B. COHEN and
ADOLPH BOSKOWITZ,
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EBERT PRESS, 45 VESEY STREET N. Y. TEL. 7554 CORTLAND.

IN THE

Supreme Court of the United States

SAMUEL C. COHEN, as trustee in Bankruptcy of ELIAS W. SAMUELS, Bankrupt,
Appellant,

AGAINST

ELIAS W. SAMUELS,
Appellee

October Term 1917.

No. 359

REPLY BRIEF OF TRUSTEE.

Statement.

The bankrupt in his brief, contends that the surrender values of the policies in question were not part of the bankrupt's assets at the time of his adjudication as a bankrupt and also that the reservations in the policies of the power to change beneficiaries are not assets which pass to the trustee in bankruptcy. In support of these statements, the bankrupt advances arguments to sustain which he cites certain authorities.

The trustee feels it his duty to bring to the attention of the Court, the fact that none of the authorities cited supports the contentions of the bankrupt and that many of the cases in his brief are not in point with the arguments they are alleged to substantiate.

The trustee will not burden the Court with a further consideration of any cases cited in his brief, but will confine himself solely to a brief analysis of those cases which are cited by the bankrupt and which have not been commented upon in the brief submitted by the trustee.

We pass over *POINT I.* of the Bankrupt's brief which raises no issue and has no bearing upon the question involved heerin.

In *POINT II.* of the bankrupt's brief, the proposition is advanced that the cash surrender value of the policies are not part of the bankrupt's estate passing to the trustee in bankruptcy at the time of the adjudication, because the designated beneficiaries of the policies had vested rights which were not defeated by the bankruptcy. In support of this statement, the bankrupt on page 8 of his brief, meanders into the field of co-operative insurance associations citing several cases dealing with the subject, and then on page 9 states:

> "In the matter at bar the policies are entirely unlike that of co-operative insurance to which the above rule may apply. The policies of insurance in the matter at bar are not a membership benefit, but a contract obligation."

Washington Central Bank vs. *Hume*, 128, U. S. 205, is cited on page 9 of the bankrupt's brief, but has no application to anything that precedes or follows it. In that case, the policy of insurance was issued upon the husband's life and *the contract was made by the wife and children with the insurance company.* The husband who was insolvent, had no interest in the policies at their inception. In all other respects also, the case is entirely dissimilar from the one at bar.

On page 10 of the bankrupt's brief, decisions are cited to support his theory that the surrender values of the policies are not assets passing to the trustee in bankruptcy.

The case cited, *Matter of Buelow*, 98 Fed. 87, decides that the policies had no surrender value, and, therefore, are not assets of the bankrupt. There are no particulars stated in the decision, as to the policies, not even the companies' names being mentioned.

The other case cited, *Matter of McDonald*, 101 Fed. Rep., 239, gives no particulars relating to the policy, but the Court decided that the bankrupt had no interest in the policy which the trustee could claim under Section 70-A. But the bankrupt in this case was the *beneficiary*, and the Court said:

> "In these policies the bankrupt is named as a beneficiary, but he is not the contracting party with the Company, nor would the surrender value be payable to him or his estate and therefore the trustee has no interest therein."

As counsel for the bankrupt cites this case, he must regard it as authority for the proposition it contains that *the beneficiry has no interest in the surrender value of a policy as he is not a party to the contract of insurance.*

Page 10, in *Gould* vs. *New York Life Insurance Co.*, 132 Fed., 927, only one years premium had been paid, and the policy provided that until after two years' premium were paid it would have no surrender value.

Clarke vs. *Equitable Life Insurance Society*, 143 Fed., 175, was an action by the assured against the company to set aside an assignment he had made to a third party to whom he had *sold* the policy.

Furthermore, the Court said:

> "The bankrupt never availed himself of the privilege given by the proviso and the *policy* therefore passed to the trustee as assets of the estate."

In conformity with the usage and custom heretofore discussed, all the companies will pay to the insured the surrender value *before lapse*, permitting him to substitute himself as beneficiary, in order to obtain surrender value and dispensing with the release of beneficiaries designated in the policies.

The New York cases cited on page 11 concern themselves with policies of insurance in which the assured did not reserve the right to change the beneficiary and hence have no application whatsoever to the facts herein involved. At the time these cases were decided insurance policies contained no provision permitting a change of beneficiaries.

The *Hammel case*, 34 Am. B. R. 46 (221 Fed. 56) which is cited and discussed on pages 12 and 13 of the bankrupt's brief, is fully elaborated upon in the trustee's brief, pages 18 to 21, to which the Court isrecpectfully referred.

Everett vs. *Judson*, 228 U. S. 474 and *Andrews* vs. *Partridge*, 228 U. S. 479 cited on page 14 of the bankrupt's brief, hold that the surrender value passed to the trustee in bankruptcy at the time of the filing of the petition although in the former case the policy did not follow the identical wording of the statute and there is no dispute that in the latter case the policies were payable to the bankrupt's estate.

Matter of Lyon, 32 A. B. R. 433, is dealt with on pages 14, 15 and 16 of the bankrupt's brief.

All that is quoted from this case is the Referee's opin-

ion, which was affirmed by the District Court and which is far from being conclusive on this Court or the trustee herein, especially when it can be seen that the Referee was not familiar with the *entire* custom he mentioned which allows the assured to change the beneficiary to himself and get the surrender value without any receipt or release from the bankrupt, and that as the trustee now has the right and power to do the same, no beneficiaries, whether they be wife or stranger, need be coaxed or coerced to give a consent to a transaction in which they have no interest.

Matter of Young, 31 A. B. R., 29, 208 Fed. Rep. 373.

Policy 1 was payable to wife, and bankrupt had the right to change the beneficiary and bankrupt was to receive the surrender value without wife's consent.

Policy 2 was payable to wife, and *bankrupt had no right to change the beneficiary.* It had a surrender value at certain periods, and bankrupt was to receive the surrender value without wife's consent. It was held that *these two policies* were not *to be sold* by the trustee.

Policy 3 was payable to the wife and was an endowment policy payable $250 yearly or to commute in one sum. The bankrupt had right to change beneficiary. It was held that this policy passed to trustee and could be sold by him.

The Court cited *re Herr* 182 Fed. 715, in which latter case the Court said:

> "While the wife, as it stands, is the contingent beneficiary, the policy is under the control of the bankrupt and he may change the situation at any moment and realize upon it without regard to her,

either giving it up and getting the surrender value, or continuing it with a newly designated beneficiary, just as he may choose." (p. 34)

Policy 4 was payable to the children or their executors administrators or assigns. Had surrender value payable to children after ten years and five years thereafter to the bankrupt, if living. Held that bankrupt had no interest in this policy and that it did not pass to trustee.

Matter of Churchill, 31 A. B. R. 29, (209 Fed. Rep. 766) refers to a paid-up policy issued in 1902. The policy provided that it would have no surrnder value until 1912—the bankruptcy occurred in 1910 and policy was payable to wife. The opinion does not state if bankrupt reserved right to change beneficiary. The company wrote that it does not pay a surrender value unless stated in the policy. *Referee* decided that policy had a surrender value and passed to the trustee. *District Court* decided that a surrender value not stated in the policy but paid by usage of the company, was not the surrender value of Section 70-A and that though the policy had no surrender value, the *policy* itself passed to the trustee. *The District Court was reversed.*

Matter of Pfaffinger, 21 A. B. R. 189, 164 Fed. 526 was decided before *Burlingham* vs. *Crouse*. Policy was payable to wife and had a surrender value. The bankrupt had the right to change beneficiary. The policy wes *exempt* under the Laws of Kentucky, and Section 6 of the Bankruptcy Act adopts the laws of the States, and Section 70-A deals only with *non-exempt* policies, hence nothing passed to the trustee.

In *re Hugo Lange*, cited on page 17 of bankrupt's brief deals with an endowment policy payable to the bankrupt, which had a surrender value at the time of bankruptcy.

The Code of Iowa provides that "the proceeds of an endowment policy payable to the assured on attaining a certain age, shall be exempt from liability from any debts." The Court held that Section 70-A, Paragraph 5 was a limitation on Section B of the Bankruptcy Act dealing with exemptions under State laws and that the former prevailed. The Court stated that "the endowment policy in question forms part of the assets of the estate of a bankrupt and the title thereto vests in the trustee, unless the bankrupt within thirty days exercises the right secured to him of paying or securing to the trustee the surrender value of the policy."

Matter of Hernirk, 1 A. B. R., 713, was decided long before *Burlingham* vs. *Crohse*, 228 U. S. 459. The policy was payable to the bankrupt at the expiration of twenty years from its date, or if he died before that period, to his wife. The Court held that the policy had no value at the time of bankruptcy of which the bankrupt could personally avail himself, and hence the surrender value did not pass to the trustee under Section 70-A, Subdivision 5.

Sanders vs. *Aetna Ins. Co. et al.*, 31 A. B. R. 855, 76 Southeastern, 532, is cited on page 20 of the bankrupt's brief. In that case, the policy of insurance never acquired a surrender or loan value, owing to the insufficient time it was in force. The Court held that since the policy never had acquired a surrender or loan value, it did not come within the terms of Section 70-A Subdivision 5 of the Bankruptcy Act, and hence did not pass to the trustee in bankruptcy.

Excerpts from the opinion in *Matter of Felterman*, 39 A. B. R., 834, (not yet reported in Federal) are printed on pages 20 and 21 of the bankrupt's brief. The Berkshire Life Insurance Company issued a policy

for $1,000 upon the bankrupt's life, in favor of his wife. The insured reserved no power to change the beneficiaries and the policy was payable only at the death of the insured. The policy had a cash surrender value which was payable only upon the execution and delivery to the Company a satisfactory release of all interests and claims to the avails thereof". Held, that this policy does not pass to the trustee in bankruptcy. A second policy was involved similar to the other, except that the bankrupt reserved the right to change the beneficiary without his wife's consent and that the policy could be surrendered "with a written assent of he person to whom it is made payable". The Court declined to decide upon the issues involved as to the second policy, owing to the numerous conflicting decisions, but held that the policy *was exempt under the laws of Ohio.*

The bankrupt makes a separate point of the proposition that the reservation of a power to change a beneficiary is not an asset which passes to the trustee (POINT III. bankrupt's brief, page 22).

In support of this proposition, he cites the case of *Jones* vs. *Clifton*, 101 U. S. 225.

In that case the bankrupt executed a deed poll providing for a family settlement by virtue of which he *passed title* to certain real property and certain life insurance policies to his wife, and reserved to himself in the deed the power to revoke the settlement. That case wes decided in 1880, when the Bankruptcy Act of 1867 was in force. The policies did not contain the power to change the beneficiary, and the Bankruptcy Act of 1867 contained no provisions affecting life insurance policies. The settlor *divested himself completely of his title* to the real estate and to the policies, and simply retained the power to revoke the settlement or subject it to other uses.

Justice Field, who wrote the opinion in that case decided that the naked power of revocation which the bankrupt retained was not property passing to an assignee in bankruptcy. In the case at bar the bankrupt, at the time of his adjudication *was possessed of the title* and also with the power to change the beneficiary. This title, and the power incidental thereto, passes to the trustee under Section 70-A of the Bankruptcy Act. It is undisputed that a power of appointment not coupled with any interest is not property or a chose in action which would pass to a trustee in bankruptcy. It is submitted however, that if such power is coupled with an interest in property, and permits the donee of the power to appoint himself under its terms, then, and in that event, the trustee in bankruptcy may substitute himself in the stead of the donee of the power, under Section 70-A of the Bankruptcy Act. In addition, the settlement was for the benefit of the wife of the bankrupt, whereas, in the case at bar, the designated beneficiaries are sisters and a niece of the bankrupt.

We have studiously refrained thus far from commenting upon the arguments advanced by counsel for the bankrupt in his brief, but we feel that we must draw the attention of the Court to the final statements on pages 26 and 27 of the bankrupt's brief, because of the startling nature of the reasoning therein. Assuming that the trustee would be in the position of an assignee of the policies, that would invest him with title and would certainly carry with it the power to change the beneficiaries of the policies and substitute therefor himself, or his estate, in the place of the beneficiaries designated by the bankrupt. The assignment, if it is to be called such, would deprive the bankrupt of any interest what-

soever in the policies and all of the rights and privileges of the bankrupt to these policies would naturally pass to the trustee, the new owner and holder of same.

This is recognized in the case of *Burlingham* vs. *Crouse*, 228 U. S., 459, where the Court denied the application for an injunction to restrain the assignee of the policy from collecting the proceeds of the policy and stated that he was the sole and absolute owner thereof and could deal with it in any manner he saw fit.

We have analyzed the cases cited in the bankrupt's brief without comment and we submit that these cases are not pertinent to the issues at bar, and neither sustain counsel's arguments, nor are applicable to the points under which they are cited.

Respectfully submitted.

LAWRENCE B. COHEN,
Solicitor for Petitioner.

LAWRENCE B. COHEN and
ADOLPH BOSKOWITZ,
of Counsel.

OPINION

COHEN, TRUSTEE IN BANKRUPTCY OF SAMUELS, *v.* SAMUELS.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 359. Argued October 17, 1917.—Decided November 5, 1917.

A policy of insurance held by a bankrupt, which has a cash surrender value at the time of the adjudication, becomes an asset, to the extent of such value, in the trustee, under § 70-a of the Bankruptcy Act, even when the policy is payable to a beneficiary other than the bankrupt, his estate or personal representatives, if the bankrupt has reserved absolute power to change the beneficiary.

237 Fed. Rep. 796, reversed.

THE case is stated in the opinion.

Mr. Lawrence B. Cohen, with whom *Mr. Adolph Boskowitz* was on the briefs, for petitioner.

Mr. Samuel Sturtz for respondent.

MR. JUSTICE MCKENNA delivered the opinion of the court.

On May 13, 1915, Elias W. Samuels filed a voluntary petition in bankruptcy and was adjudicated a bankrupt. On the same day Cohen, petitioner herein, was duly elected his trustee. Samuels at the time of the adjudication held five life insurance policies in various life insurance companies.

On September 16, 1915, Cohen made motions before the referee in bankruptcy to require Samuels to deliver to him, Cohen, the policies or pay to him the cash surrender value of them as of the date of the adjudication. The motions were denied.

Subsequently Cohen filed petitions to review the rulings of the referee as to three of the policies, which petitions came on for hearing before the United States District Court for the Southern District of New York February 14, 1916.

The policies were respectively for the sums of $3,000, $3,000 and $1,000 and had respectively a cash surrender value of $193.85, $753, subject to a deduction of a loan of $555 and interest, and $396. The policies were payable to certain relatives of Samuels as beneficiaries and it was provided in each that Samuels reserved the absolute right to change the beneficiary without the latter's consent.

The District Court affirmed the orders of the referee, following what the court conceived to be the ruling in *In re Hammel & Co.*, 221 Fed. Rep. 56.

Cohen petitioned the Circuit Court of Appeals to revise the ruling of the District Court as provided in § 24-b of the Bankruptcy Act and for such other and further relief as might be proper.

The Circuit Court of Appeals affirmed the ruling of the District Court, one judge dissenting. 237 Fed. Rep. 796.

The facts are not in dispute. The policies had a cash surrender value at the time Samuels was adjudicated a

bankrupt which the companies were willing to pay to him and in all of them he had the absolute right to change the beneficiaries.

The question in the case is the simple one of the construction of § 70-a. By it the trustee of the bankrupt is vested by operation of law with title to all property of the bankrupt which is not exempt, "(3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person, . . . (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: *Provided*, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; . . ."

Regarding the section in its entirety there would seem to be no difficulty in its interpretation, but we are admonished by the decision of the Circuit Court of Appeals and its reasoning and also by the argument of counsel that there are considerations which give particular control to the proviso and distinguish between insurance policies and other property which the bankrupt can transfer or which can be levied upon and sold under judicial process against him (subdivision 5). We have given attention to those considerations and feel their strength, but they are opposed by other considerations. It might indeed be that it would better fulfill the protection of insurance by considering the proviso alone and literally, regarding the

policy at the moment of adjudication, and, if it be not payable then in words to the bankrupt—no matter what rights or powers are reserved by him, no matter what its pecuniary facility and value is to him—to consider that he has no property in it. But we think such construction is untenable. The declaration of subdivision 3 is that "powers which he might have exercised for his own benefit" "shall in turn be vested" in the trustee, and there is vested in him as well all property that the bankrupt could transfer or which by judicial process could be subjected to his debts, and especially as to insurance policies which have a cash surrender value payable to himself, his estate or personal representative. It is true the policies in question here are not so payable, but they can be or could have been so payable at his own will and by simple declaration. Under such conditions to hold that there was nothing of property to vest in a trustee would be to make an insurance policy a shelter for valuable assets and, it might be, a refuge for fraud. And our conclusions would be the same if we regarded the proviso alone.

This court has been careful to define the interest of bankrupts in the insurance policies they may possess. In *Hiscock* v. *Mertens*, 205 U. S. 202, we gave a bankrupt the benefit of the redemption of a policy from the claims of creditors, though a cash surrender value was not provided by it but was recognized by the insurance company. In *Burlingham* v. *Crouse*, 228 U. S. 459, 473, we said that it "was the purpose of Congress to pass to the trustee that sum which was available to the bankrupt at the time of bankruptcy as a cash asset, otherwise to leave to the insured the benefit of his life insurance." See also *Everett* v. *Judson, Id.* 474. Judgment of the Circuit Court of Appeals affirming the order of the District Court is reversed and the case remanded to the District Court for further proceedings in accordance with this opinion.

Reversed.